85-945

No. .....

Supreme Court, U.S.
FILED
NOV 13 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

OGLALA SIOUX TRIBE OF THE PINE RIDGE INDIAN RESERVATION,

Petitioner,

vs.

THE STATE OF SOUTH DAKOTA, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether an unceded portion of the Pine Ridge Indian Reservation can be organized into a county government by consolidating the area with an off-reservation county, when the consolidation is contrary to the express language of a treaty which sets aside the area for the exclusive use and control of the Indians, an Act of Congress expressly guaranteeing an orderly tribal government in the area, and Section 4 of the South Dakota Enabling Act which disclaims all right and title to unceded Indian land.

II. Whether the taxation of Indian land located in an unceded portion of the Pine Ridge Indian Reservation by a county is preempted by Section 4 of the South Dakota Enabling Act or impermissibly infringes on tribal self-government.*

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*List of Parties. Pursuant to Rule 21.1 (b) of the Rules of the United States Supreme Court, the following is a list of all parties to the proceedings before the Eighth Circuit Court of Appeals, to-wit: The Oglala Sioux Tribe of the Pine Ridge Indian Reservation was the only Appellant. The State of South Dakota, Governor William J. Janklow, Jackson County Auditor Vicki Wilson and Jackson County Commissioners Bruce Conlee, Clarence Reutter, Robert Holcomb, Jack Evans and Ronald Gartner were the Appellees.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner Oglala Sioux Tribe respectively prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Eighth Circuit entered in these procedings on August 15, 1985.

OPINION BELOW

The opinion of the Court of Appeals in *Oglala Sioux Tribe v. The State of South Dakota,* is reported at 770 F.2d

730 and appears in Appendix A. The Opinion and Supplemental Opinion of the District Court were not reported and appear in Appendix B and C.

JURISDICTION OF THE COURT

The Judgment and Opinion of the Court of Appeals was entered on August 15, 1985. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

CONSTITUTIONAL PROVISIONS, TREATIES AND STATUTES INVOLVED

The constitutional provisions involved are the Fourteenth and Fifteenth Amendments (Appendix D). The treaty provisions involved are the Treaty of July 5, 1825, 7 Stat. 252, Art. 1 (Appendix E); the Treaty of September 17, 1851, 10 Stat. 969, Art. 5 (Appendix F); the Treaty of October 28, 1865, 14 Stat. 747, Art. 1 (Appendix G); the Treaty of April 29, 1868, 15 Stat. 635, Art. 2, 12 (Appendix H). This case also involves the March 2, 1861 Dakota Territory Organic Act, 12 Stat. 239, Sec. 1 (Appendix I); the Act of March 3, 1871, 16 Stat. 566 (Appendix J); the Act of February 28, 1877, 19 Stat. 254, Sec. 8 (Appendix K); the South Dakota Enabling Act of February 22, 1889, 25 Stat. 676, Sec. 4 (Appendix L); the Agreement of March 2, 1889, 25 Stat. 888, Sec. 1, 16, 19, 28 (Appendix M); the Act of June 2, 1924, 43 Stat. 253 (Appendix N); and 25

U.S.C. 349, 462, 476, 478b, 1322, 1324 and 1326 (Appendix O). This case also involves Article XXII of the South Dakota Constitution (Appendix P); South Dakota Codified Laws, Sec. 10-12-9, 10-12-10 and 10-12-23 (Appendix Q); and Articles I and IV of the Oglala Sioux Tribal Constitution (Appendix R).

STATEMENT OF THE CASE

In the 1860's, the Sioux Indians were engaged in war with the United States in the Powder River Country. This war did not end with the defeat of the Sioux Nation. Instead, a treaty of peace was entered into at Ft. Laramie on April 29, 1868 (15 Stat. 635; App. H). In this treaty, the Sioux bargained for and were guaranteed a permanent reservation ("The Great Sioux Reservation") in their aboriginal territory. All of present western South Dakota was included in this reservation, which was set aside for their "absolute and undisturbed use and occupation."

Congress subsequently confiscated a portion of the Great Sioux Reservation in the Agreement of February 28, 1877. 19 Stat. 254; App. K. See *Sioux Nation v. United States*, 448 U.S. 371 (1980). In Article 8 of the Agreement, Congress promised the Sioux Indians that it would "by appropriate legislation secure to them an orderly government" over the remainder of the reservation.

The Act of March 2, 1889 (25 Stat. 888), created six smaller reservations within the Great Sioux Reservation, including the Pine Ridge Indian Reservation (App. at

M-1).[1] The Pine Ridge Reservation is occupied by the Oglala Sioux Tribe ("the Tribe"). It is the second largest Indian reservation in the United States and has a population that is 90.3% Indian. See Report No. PC80-S1-13, *American Indian Areas and Alaska Native Villages 1980* (U.S. Bureau of Census, 1980).

The Act of February 22, 1889, 25 Stat. 676, created the State of South Dakota, which superimposed four counties on the Pine Ridge Reservation, viz: Shannon, Washington, Bennett and Washabaugh Counties. Bennett County was organized and opened up to non-Indian settlement by the Act of May 27, 1910. 36 Stat. 440. Shannon and Washington Counties were merged as an "unorganized" county in the 1940's. Thus, Shannon and Washabaugh Counties remain *unceded* tribal territory.[2]

This case concerns Washabaugh County, which was never organized under state law because of its unceded status. Consequently, the State of South Dakota attached this county to the neighboring off-reservation County of Jackson for judicial purposes. According to the 1980

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[1]The Tribe contended at trial that the 1889 Act was never implemented at Pine Ridge Agency as mandated by Congress in Section 28 of the Act, since three-fourths of the adult males at the Agency did not consent to the Act.

[2]There is no dispute in this case that the Washabaugh County area remains unceded Indian territory. Transcript at 113-14. A bill (S. 111, April 6, 1911), which contained "cession" language, was introduced in Congress by Senator Gamble of South Dakota in 1911 for the purpose of authorizing the sale and disposition of surplus, unallotted lands in Washabaugh County to non-Indians. App. at T-1, 2. The proposal was never enacted into law.

Bureau of Census Report, over 72% of the population of the county is Indian and over 50% of the land area is federal trust land. See *Summary Tape File 1 - Microfiche, 1980 Census.* Substantial amounts of fee patented land is also owned by tribal members.

On January 15, 1936, the Secretary of the Interior approved the Tribe's constitution under Section 16 of the Indian Reorganization Act of 1934. 25 U.S.C. 476. The Washabaugh County area was included as tribal territory under Article 1. App. at R-1. The area is governed by the Tribal Council and two political subdivisions of the Tribe.

The Act of August 15, 1953 (P.L. 83-280), 67 Stat. 538, offered South Dakota the opportunity to amend Article XXII of its constitution and assume civil and criminal jurisdiction over the Washabaugh County area, but the people of the State defeated a proposal to accept "Public Law 280" jurisdiction in the 1964 General Election.

The Act of April 11, 1968, 82 Stat. 77, amended Public Law 280 and provides that no state may thereafter assume criminal or civil jurisdiction over Indian people on reservations without tribal consent expressed in a special referendum election conducted by the Secretary of the Interior. 25 U.S.C. 1321-1326. The Act also authorizes states to amend their constitutions to assume such jurisdiction. South Dakota has never amended its constitution and no secretarial election has been held to allow the state jurisdiction on the Pine Ridge Reservation.[3]

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[3]The State admitted in paragraph 21 of its Answer to the Amended Complaint that "[u]nder 25 U.S.C. 1326, the State may not assume jurisdiction over Indians in the territory formerly known as Washabaugh County, unless the majority of the adult members in a special election vote in favor of such cession of jurisdiction. To the knowledge of the State, no such election has been called."

In *Little Thunder v. South Dakota,* 518 F.2d 1253 (1975), the Eighth Circuit Court of Appeals held that Indian residents in three unorganized reservation counties, including Washabaugh, could not be denied the right to vote for county officials in the neighboring off-reservation counties to which they were attached.[4] In a subsequent case, the Eighth Circuit also held that Indian residents of these counties could also run for political office in the organized counties to which they were attached. *United States v. South Dakota,* 636 F.2d 241 (8th Cir. 1980), *cert. denied,* 452 U.S. 939 (1981). The Tribe was not a party to either case. Moreover, the Eighth Circuit did not do a particularized inquiry into the nature of *the tribal interests at stake* to determine whether the exercise of county jurisdiction over Indian people would violate federal treaties and laws. See *White Mountain Apache Tribe v. Bracker,* 65 L.Ed.2d 665, 673 (1980).

Prior to 1976, South Dakota law prevented consolidation of unorganized counties to organized counties. Jackson County officials convinced the State Legislature to amend the law. Thereafter, the non-Indian residents of Jackson and Washabaugh Counties circulated a petition to have the counties consolidated. The consolidation was approved in the November 2, 1976 General Election and went into effect on January 1, 1979.

In 1979, the South Dakota Legislature also passed the "Unorganized Counties Act" (H.B. 1197, 54 Sess.), which repealed sections of South Dakota Codified Laws (SDCL)

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[4]The other two unorganized counties were Shannon County located on the Pine Ridge Reservation and Todd County located on the Rosebud Indian Reservation.

providing for the governing of unorganized reservation counties. The State Legislature thus accomplished *indirectly* what they could not do *directly* by extending their jurisdiction to Indian people in Shannon Conuty without an amendment to the state constitution required by 25 U.S.C. 1324 or a referendum vote of the Indian people required by 25 U.S.C. 1326.[5]

The Tribe brought an action in 1977 in the United States District Court for the District of South Dakota, Western Division, seeking declaratory and injunctive relief to invalidate the consolidation of Jackson and Washabaugh Counties and enjoin the exercise of State and County jurisdiction over Indian people in Washabaugh County.[6] The District Court assumed jurisdiction under 28 U.S.C. 1362 and held that the consolidation did not violate federal law or impermissibly infringe upon tribal self-government. App. B and C.

On Appeal, the Eighth Circuit Court of Appeals affirmed on the basis that "the mere existence of a general purpose state governmental body on the reservation is not preempted by federal law and does not impermissibly infringe on tribal self-government" and the Tribe therefore has suffred no injury. *Oglala Sioux Tribe v. South Dakota*, 770 F.2d 730, 736 (8th Cir. 1985); App. A-9.

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[5]The Oglala Sioux Tribal Council passed a resolution taking a position against the direct organization of Shannon County without tribal consent. The Tribe has not instituted legal action, choosing instead to await the outcome of the instant case.

[6]The Court of Appeals opined that the "Tribe's lawsuit boils down to the proposition that the State can have no jurisdiction in the reservation because the Tribe is the exclusive owner of all land on the reservation." 770 F.2d at 735, App. at A-8. However, all the parties stipulated at a pre-trial conference that only jurisdictional issues would be litigated in this case.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS OPINION CONFLICTS WITH McCLANNAHAN v. ARIZONA STATE TAX COMMISSION BY HOLDING THAT THE 1889 SOUTH DAKOTA ENABLING ACT WAIVED ONLY PROPRIETY AND NOT GOVERNMENTAL INTERESTS ON THE PINE RIDGE INDIAN RESERVATION.

In *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) this Court found that disclaimers in state enabling acts which disclaim right and title to Indian lands "are disclaimer(s) of proprietary rather than governmental interest" and the absolute jurisdiction and control over reservations typically given to the United States means "undiminished, not exclusive" control. *Id.* at 69. *In McClanahan v. Arizona State Tax Commission*, 411 U.S. 164 (1973), this court indicated that its holding in *Egan* "came in the context of a decision concerning the fishing rights of non-resident Indians * * * *It did not purport to provide guidelines for the exercise of state authority in areas set aside by treaty for the exclusive use and control of Indians.*" *Id.* at n. 15. [Emphasis Supplied].

A. The Pine Ridge Indian Reservation was set aside for the exclusive use an control of the Oglala Sioux Tribe by the 1868 Ft. Laramie Treaty.

The Court of Appeals misapplied *Organized Village of Kake v. Egan, supra,* to the Pine Ridge Reservation.

770 F.2d at 735; App. at A-10. *Egan* does not provide guidelines for the exercise of state authority on the Pine Ridge Reservation since the 1868 Ft. Laramie Treaty initially set aside the Great Sioux Reservation "for the absolute and undisturbed use and occupation" of the Sioux Nation, including the Oglala Sioux, and provided further that "no persons except those herein designated and authorized so to do . . . shall ever be permitted to pass over, settle upon, or reside in the territory" encompassed within the reservation. 15 Stat. 635, Art. 2.

In the 1877 Agreement, Congress expressly recognized the exclusive right of the Sioux Nation to control and govern the Great Sioux Reservation, as diminished by the Act (i.e., outside the Black Hills taking area). The Agreement provided that "Congress shall, by appropriate legislation secure to them an orderly government" to govern the reservation. 19 Stat. 254, Art. 8.

> The pledge to secure to these people, with whom the United States was contracting as a distinct political body, an orderly government . . . necessarily implies, having regard to all the circumstances attending the transaction, that among the arts of civilized life, which it was the very purpose of all these arrangements to introduce and naturalize them, was the highest and best of all, that of self-government, the regulation of themselves of their own domestic affairs, the maintenance of order and peace among their own members by the administration of their own laws and customs.

Ex Parte Crow Dog, 109 U.S. 556, 568-69 (1883).[7]

The right of the Oglala Sioux to exclusively use, occupy and govern the Pine Ridge Reservation under the 1868 Treaty and 1877 Agreement was expressly provided for in the 1889 Act. 25 Stat. 888, Sec. 19. This right was continued under the Indian Reorganization Act. 25 U.S.C. 478b.

B. The disclaimer in the South Dakota Enabling Act, when read in pari materia with the 1861 Dakota Territory Organic Act and tribal treaties and agreements, establishes that the State of South Dakota waived its governmental rights to the unceded portions of the Pine Ridge Indian Reservation.

The question of whether the State of South Dakota waived governmental rights to the Washabaugh County area cannot be decided without reading the 1889 South Dakota Enabling Act *in pari materia* with the 1861 Dakota Territorial Organic Act and tribal treaties and agreements.

The Tribe entered into its first treaty with the United States on July 5, 1825. This treaty initiated their formal political relations. The Tribe recognized that it resided

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[7]Although the 1877 Agreement is called an "agreement," this Court found in *Sioux Nation v. United States*, 488 U.S. 371 (1980), that the United States failed to obtain the requisite number of adult male signatures under Article 12 of the 1868 Treaty for it to become an agreement. The acquisition of the Black Hills under the Agreement therefore constituted an unconstitutional taking in violation of the just compensation clause of the Fifth Amendment. Article 8 of the Agreement, however, is still valid.

within the limits of the United States, acknowledged the supremacy of the United States and claimed their protection. 7 Stat. 252, Art. 1. The Tribe did not, however, "surrender its independence, its right to self-government, by associating with a stronger [power] and taking its protection." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 159 (1982).

In the 1851 Ft. Laramie Treaty, the United States recognized the present Pine Ridge Reservation area as unceded tribal territory. 10 Stat. 969, Art. 5.

The 1861 Dakota Territory Organic Act provided in pertinent part that:

> nothing in this act contained shall be construed to impair the rights of persons or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty . . .. or to include any territory which, by treaty with an Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state or territory; but all of such territory shall be excepted out of the boundaries and constitute no part of the territory of Dakota, until said tribe shall signify their assent to the President . . . to be included within the said territory.

12 Stat. 239, Sec. 1; 48 U.S.C. 1451. This Act makes a clear distinction between federal territorial lands and unceded Indian treaty lands. It provides that the Tribe's 1851 Treaty territory (and later its 1868 Treaty and 1889 Agreement territory) would not be included within the territorial limits or jurisdiction of Dakota Territory, and future states such as South Dakota, without tribal consent.

In the 1868 Treaty, the Great Sioux Reservation was established for the "absolute and undisturbed use and

occupat[illegible]f the Sioux Nation, including the Oglala Sioux. [illegible]ovided that only authorized persons would ever be permitted to "pass over, settle upon, or reside in the territory." 5 Stat. 635, Art. 2.

In the 1877 Agreement, Congress promised to secure to the Tribe an orderly government within its unceded territory, exclusive of state and county government. 19 Stat. 254, Art. 8.

The 1889 Act created the Pine Ridge Indian Reservation "as a permanent reservation" for the Oglala Sioux Tribe and made prior treaties and agreements applicable to the Reservation. 25 Stat. 888, Sec. 1 and 19.

The foregoing treaties, agreement, and act establish that unceded tribal territory will remain under the exclusive use and control of the Tribe. These instruments must be construed together with the 1889 South Dakota Enabling Act to determine whether the State of South Dakota waived its governmental interest to unceded Indian territory in Washabaugh County.

In the Enabling Act, the people of South Dakota agreed to:

> provide by ordinance irrevocable without the consent of the United States and the people of said states . . . That the people inhabiting the proposed states do agree and declare that they forever disclaim all right and title . . . to all lands lying within the limits owned or held by any Indian or Indian tribe; and that until the title shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States.

25 Stat. 676, Sec. 4. This disclaimer indicates a congressional intent to preserve the separate and distinct character of the Sioux reservations in western South Dakota so long as they remain unceded.[8]

Thus, the foregoing establishes that the people of South Dakota agreed to recognize prior treaty obligations that unceded Indian lands would remain under the use and control of the Tribes until "title shall have been extinguished by the United States." Any present interest that the State of South Dakota may have in the Washabaugh County area is limited to a mere future expectancy and beneficial interest in these lands, should they ever be ceded in accordance with law.

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[8]Congressional debates also substantiate this:

". . . at least 37,000 square miles of South Dakota are covered by Indian reservations. If you deduct this area from the 77,000 square miles comprised within South Dakota, it will leave an area upon which the government of South Dakota will operate at only 40,000 square miles," and " . . . there are . . . nine Indian reservations, the jurisdiction of which is reserved to the United States . . ." 19 Cong. Rec. 2838 (1888).

The House Committee on the Territories shared the same view:

"Your committee desire to call attention to the fact that there are, in the territory of Dakota, large Indian reservations, which by the terms of the bill are exempted from the jurisdiction of the proposed states . . . This is more than one-fourth of the entire area of the Territory . . . In view of the fact that these Indian lands are not open to settlement, are not subject to taxation, and remain within the exclusive control and jurisdiction of the United States, the area of Dakota upon which the state government can operate is reduced to 70,000 acres—a less [sic] area than that of the State of Nevada." H.R. Rep.No. 1025, 50th Cong., 1st Sess., at 8-9 (1888).

C. The Court of Appeals legislated organized county government on the Pine Ridge Indian Reservation by upholding Little Thunder v. South Dakota and United States v. South Dakota, against the Oglala Sioux Tribe and failing to do a particularized inquiry into the nature of tribal interests at stake to determine whether the exercise of state and county authority would violate federal treaties and laws.

The Court of Appeals, in affirming the District Court, essentially legislated organized county government for the Indian people residing in Washabaugh County[9] by upholding *Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) and *United States v. South Dakota* 636 F.2d 241 (8th Cir. 1980), *cert. denied*, 452 U.S. 939 (1981). See 770 F.2d at 733 n.1, 736; App. at A-4 n.1, 12.

Little Thunder held that Indian residents of an unorganized reservation county could not be denied the right to vote for county officials in the organized off-reservation county to which it was attached. *United States v. South Dakota* further held that Indian residents of unorganized counties could not be denied the right to run for office in the organized county. Neither case involved the Tribe and the Court of Appeals in both cases failed to make "a particularized inquiry into the nature of the . . . *tribal interests* at stake . . . to determine whether, in the specific context, the exercise of state authority would violate federal law"[10]

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[9]The State of South Dakota acknowledges this in its brief filed with the Eighth Circuit by stating that "[a] de facto consolidation of these two counties was affected by this Court's ruling in the *Little Thunder* decision." State's Brief at 5.

[10]The Tribe filed a suggestion with the Eighth Circuit to hear this case *en banc* and either modify or overrule *Little Thunder* and *United States v. South Dakota*. The suggestion was denied.

White Mountain Apache Tribe v. Bracker, supra, 65 L.Ed.2d at 673. [Emphasis Supplied].

Congress, and not the federal courts, has plenary power over Indians. *Lone Wolf v. Hitchcock,* 187 U.S. 553 (1903). Congress provided a procedure in the 1889 Act for the Secretary of the Interior to negotiate with the Tribe for the "purchase and release" of unallotted lands on the Pine Ridge Reservation for non-Indian settlement. 25 Stat. 888, Sec. 12. Pursuant to this section, a bill was introduced in Congress in 1911 to authorize the sale and disposition of surplus, unallotted lands in Washabaugh County. App. at T-1. Although this proposal contained "cession" language, it was never enacted into law. Jackson County officials admit that no treaty or act of Congress exists which expressly authorizes South Dakota to organize county government on unceded portions of the Pine Ridge Reservation. Transcript at 368, 369, 504-505.

1. Public Law 83-280 forbids county jurisdiction without an amendment to the South Dakota Constitution and Tribal consent.

The State of South Dakota did not accept the assumption of criminal and civil jurisdictional over Indian people under Public Law 280. Also the state has not amended its constitution under a 1968 amendment to Public Law 280 to accept such jurisdiction with tribal consent. 25 U.S.C. 1324, 1326. But even if the State had complied with 25 U.S.C. 1324 and 1326, "P.L. 280 subjected Indian country only to the civil laws of the state, and not to local regulation." *Santa Rosa Band of Indians v. Kings County,* 532 F.2d 655, 661 (9th Cir. 1975). Thus, the Court of Appeals opinion allows Jackson County — a local govern-

ment — to assume jurisdiction over Indian people which isn't even allowed in a Public Law 280 state. The Court of Appeals is allowing Jackson County to do *indirectly* what it cannot do *directly* under Public Law 280.[11]

D. The State of South Dakota and Jackson County cannot lawfully assume control and jurisdiction of enrolled tribal members residing on unceded reservation territory on the Pine Ridge Indian Reservation on the basis that they are state citizens.

Both prior to and subsequent to the adoption of the Fourteenth Amendment, Indians holding tribal relations were not regarded as either federal citizens or state citizens. The Attorney General of the United States recognized this in 1856:

> The fact, therefore, that Indians are born in this country does not make them citizens of the United States.

70 Op. Atty. Gen. at 746. This situation did not change upon the adoption of the Fourteenth Amendment. See *Effect of the Fourteenth Amendment Upon Indian Tribes,* 41st Cong., 2nd Sess., S.Rep. No. 278 (1870). See also *Elk v. Wilkins,* 112 U.S. 94 (1884). Hence, the only way to gain United States citizenship was to voluntarily sever the tribal relationship. Congress, however, still had to accept expatriation before it became effective. *Elk v. Wilkins, supra; United States v. Holliday,* 70 U.S. (3 Wall.) 407 (1866).

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[11]The Court of Appeals even approves the *direct* organization of Shannon County by the State of South Dakota without discussion of the procedures set forth in 25 U.S.C. 1322-1326. 770 F.2d at 733 n. 2, App. at A-5 n. 2.

The Indian citizenship Act of June 2, 1924 (43 Stat. 253), conferred United States citizenship on all Indians born within the territorial limits of the United States, but expressly provided that "the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property." This Act did not expressly make Indians citizens of the states wherein they reside.[12]

The Oglala Sioux Tribe maintains that it takes a special act of Congress to make enrolled members of the Tribe who reside on the reservation state citizens. The District Court rejected this argument:

> Plaintiff asserts that members of the Oglala Sioux Tribe and descendants thereof are not citizens of the State of South Dakota. While there was a period when Indians were not considered citizens of either the United States or any individual state, that time has long passed. Members of the Oglala Sioux Tribe residing in Washabaugh County were adjudged to be citizens of South Dakota and thereby entitled to vote, not only for state and federal officials, but also for county officials in *Little Thunder v. State of South Dakota*, 518 F.2d 1253 (8th Cir. 1975).

App. at B-4.

The Court of Appeals failed to discuss this issue. The Tribe's arguments were based on the position that: (1) only an express act of Congress can make enrolled tribal members residing on the Reservation state citizens, (2) *Goodluck v. Apache County*, 417 F.Supp. 13, 16 (D.Ariz. 1975), aff'd. 429 U.S. 876 (1980) is inapplicable because of

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[12]The Tribe does not dispute federal citizenship for its members in this case.

the Tribe's unique history, and (3) a declaration that tribal members are state citizens by virtue of the 1924 Act constitutes an unconstitutional conclusive presumption.

1. Only an express act of Congress can make enrolled tribal members residing on the Reservation state citizens.

Article I, Section 8, Clause 4 of the national constitution grants Congress the power "[4] To establish an uniform Rule of Naturalization . . ." Thus, only Congress can naturalize Indians and the Court of Appeals is in error for affirming the District Court's finding that enrolled tribal members were made state citizens by judicial fiat in *Little Thunder, supra.*[13]

2. The ruling of the District Court that enrolled tribal members residing on the Reservation are state citizens based on the Eighth Circuit's holding in Little Thunder v. South Dakota constitutes an unconstitutional conclusive presumption since state citizenship in Little Thunder is premised solely on federal citizenship.

The Court of Appeals opined in *Little Thunder v. South Dakota,* 518 F.2d 1253 (8th Cir. 1975), that since tribal members residing on the reservation are now federal citizens under the 1924 Indian Citizen Act, it can be conclusively *presumed* that they are now state citizens under

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[13]Had it been invited to participate in the *Little Thunder* case, the Tribe would have agreed with the United States District Court that a "rational basis" exists to restrict the right of tribal members to vote for county officials in the organized off-reservation counties.

Section 1 of the Fourteenth Amendment.[14] This interpretation of the 1924 Act and Fourteenth Amendment is *identical to* the proscribed interpretations addressed by this Court in its analysis of conclusive presumptions. See, e.g., *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *United States Dept. of Agriculture v. Murry*, 413 U.S. 508 (1973); *Vlandis v. Kline*, 412 U.S. 441 (1973).

II. JACKSON COUNTY'S TAXATION OF INDIAN LAND LOCATED ON THE PINE RIDGE INDIAN RESERVATION IS PREEMPTED BY SECTION 4 OF THE SOUTH DAKOTA ENABLING ACT AND IMPERMISSIBLY INFRINGES ON TRIBAL SELF-GOVERNMENT.

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[14]*Goodluck* v. *Apache County* is inapposite. That case involved Navajo Indians in Arizona. These Indians were Mexican citizens prior to ratification of the 1848 Mexican Treaty, which ceded Arizona to the United States. 9 Stat. 922. See *United States v. Dann*, 706 F.2d 919 n.7 (9th cir. 1983). Article IX of the 1848 Treaty provided that Mexican citizens who desired to become United States citizens would "be admitted at the proper time" by Congress. Thus, in *People v. De La Guerra*, 40 Cal. 311, 341 (Cal. 1870), another case involving the 1848 Mexican cession area, the Supreme Court of California held that former Mexican citizens become state citizens and, as a consequence, United States citizens when the area they resided in was granted statehood by Congress. Thus, Navajo Indians became citizens of Arizona when it became a state in 1910. 36 Stat. 557.

State citizenship for Oglala Sioux has a different history. Neither the Fourteenth Amendment nor Indian Citizenship Act conferred state citizenship on them. All rights and benefits they receive from the State of South Dakota are based on their federal citizenship. Thus, for example, the state cannot "abridge the privileges and immunities" of these United States citizens under the Fourteenth Amendment when they leave the reservation. Likewise, the right of these United States citizens "to vote shall not be denied or abridged" by states under the Fifteenth Amendment.

The tribe challenged Jackson County's taxation of fee patented land owned by tribal members in Washabaugh County before the District Court and the Court of Appeals. At trial, County officials testified that they exercised no jurisdiction over Indians on the Reservation. Moreover, they admitted that they tax all fee patented lands owned by tribal members. Transcript at 341, 375-76, 378-79, 412-14, 463; App. at S-1,2. The District Court rejected the Tribe's challenge *sub silentio* on the basis that "[t]he consolidation did not increase the scope of state governmental activity in the Washabaugh County area and therefore did not infringe on the plaintiff's rights. * * * State jurisdiction remains now the same as before the consolidation." App. at B-5.

In a Supplemental Memorandum Opinion, the District Court also found that "[a]ny attempt to increase state jurisdiction over that presently permitted by federal law would be preempted. Since it clearly appears that the consolidation of Washabaugh County into Jackson County does not increase or change state jurisdiction over Indian people in any way, it is not preempted or prohibited by federal law." App. at C-2, 3.

The Court of Appeals chose to ignore the taxation issue, finding instead that "[i]n this case, the Tribe challenges the *existence* of a general purpose state governmental body on the reservation, rather than the *exercise* of specific state governmental jurisdiction on the reservation relating to a particular area such as taxation." 770 F.2d at 734; App. at A-8.

In this case, the taxation of Indian owned fee patented lands by Jackson County is preempted by Section 4

of the South Dakota Enabling Act.[15] It also impermissibly infringes upon tribal self-government by inhibiting the Tribe's right to tax this land to support tribal governmental activities.

A. Jackson County's taxation of Indian owned fee patented lands on the Pine Ridge Indian Reservation is preempted by Section 4 of the South Dakota Enabling Act.

Section 4 of the South Dakota Enabling Act preempts Jackson County's taxation of fee patented lands on the Pine Ridge Indian Reservation owned by Indians who have never severed their tribal relations. It provides that "said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States" and "[n]othing herein . . . shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian *who has severed his tribal relations*, and has obtained from the United States or from any person a title thereto by patent or other grant . . ." [Emphasis Supplied].

In *Three Affiliated Tribes v. Wold Engineering*, 104 S.Ct. 2267, 2275 (1984), this Court interpreted Section 4 of the North (and South) Dakota Enabling Act as foreclosing "state regulation of taxation of Indians and their lands." Compare, *Battese v. Apache County*, 630 P.2d 1027 (Ariz. 1981). (County had no authority to tax fee land located on the reservation owned by an Indian). Since

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[15]It also violates Article XXII of the South Dakota Constitution which incorporates verbatim Section 4 of the South Dakota Enabling Act. App. P.

Section 4 of the Enabling Act is a "governing act of Congress," it preempts Jackson County's taxation of Indian lands. *William v. Lee*, 358 U.S. 217, 220 (1959).

B. Jackson County's taxation Indian owned fee patented lands on the Pine Ridge Indian Reservation impermissibly infringes on tribal self-government.

In this case, the Tribe not only challenged the existence of a general purpose county government on the reservation, but also the significant *increase* in taxes on reservation lands owned by tribal members. The Court of Appeals grievously erred in concluding that the Tribe sought only the broad right to be the exclusive governmental body on the reservation. 770 F.2d at 734-35; App. at A-8.

The ACTUAL INCREASE IN TAXATION to tribal members has been ignored *in toto* by both the District Court and the Court of Appeals, notwithstanding the fact that the Tribe established at trial that its constitution gives it exclusive authority to levy taxes on real property owned by tribal members.[16]

County officials also testified that real estate taxes on Indian people in Washabaugh County were increased from a mill rate of 7.90 to a mill rate of 8.3[17] to equalize the tax of each county. The taxes of the non-Indians in Jackson County were *reduced* pursuant to the mill rate ad-

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[16]The tribal constitution authorizes the Tribal Council to "to levy taxes upon members of the . . . Tribe" and "[t]o regulate the inheritance of property, real and personal, other than allotted lands, subject to review by the Secretary of the Interior." Oglala Sioux Constitution, Articles IV, Section 1 (h) and (p). App. at R-2. These powers contemplate exclusive tribal taxation and regulation of inheritance of Indian owned fee patented lands on the reservation.

[17]The 1984 mill rate for Indian land owners in Washabaugh County was to be at 21.53, a 270% increase from the pre-consolidation mill rate of 7.90. App. at S-3.

justment, from a mill rate of 10.13 to a reduced rate of 7.31. Transcript at 378-79; App. at S-2.[18]

A particularized inquiry into the mill rate increase upon the effective date of the consolidation would have required the Court of Appeals to recognize that no rational basis or compelling state interest exists for increasing the tax rate on Indian land owners, especially in view of the District Court's findings that no change occurred in either the exercise of county jurisdiction over reservation Indians or in services (other than the fact that the Washabaugh County Road Board functions were transferred to the Board of County Commissioners). 770 F.2d at 733; App. at A-6. It is, however, a direct interference with the federal policy of promoting tribal self-government and economic self-sufficiency. See, e.g., Indian Reorganization Act, 25 U.S.C. 461 *et seq.*; Indian Financing Act of 1974, 25 U.S.C. 1451 *et seq.*; Indian Self-Determination Act of 1975, 25 U.S.C. 450 *et seq.*

The county's increase in taxes on Indian owned lands[19] is also a direct restraint on the tribal government's ability to tax the same land to generate revenues for the costs of governmental services on the reservation. Indeed, tax foreclosures due to the increased taxes will have a dramatic effect on the economic self-sufficiency of the Tribe

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[18]The mill rate establishes the real property tax per each $100.00 of assessed value. Thus, on assessed property value of $100,000.00, a mill rate of 8.3 would permit taxation of $830.00, from the previous years' payment of $790.00.

[19]The State of South Dakota's pre-consolidation statutes provided sufficient limitations on real property tax increases to Indian landowners on the reservation by restricting the ability of the State to increase the mill rate in unorganized counties. See SDCL 10-12-9, 10-12-10 and 10-12-23 (1967); App. at Q-1 to 3. Upon consolidation and extinguishment of these prophylactic tax restrictions, tribal members have experienced unwarranted tax increases.

and its ability to protect the reservation land base. This constitutes an impermissible infringement on tribal self-government.

CONCLUSION

The Washabaugh County area of the Pine Ridge Reservation remains unceded Indian territory. Federal treaties and laws protect the Tribe's right to occupy and govern this area. The Court of Appeal's Judgment and Opinion, however, authorize the organization of the area for the benefit of a non-Indian population consisting of less than 10% of the total population of the reservation. If the Court of Appeals judgment is not reversed, the consolidation of the counties will have a dramatic impact on the ability of the Tribe to govern its people and protect its reservation for years to come.

Accordingly, this Court should issue a writ of certiorari to the United States Court of Appeals for the Eighth Circuit to review, and to reverse summarily, its decision below.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1997

Oglala Sioux Tribe of the
Pine Ridge Indian Reservation,

Appellant,

v.

The State of South Dakota; Richard Kneip, in his official capacity as Governor of the State of South Dakota; County of Jackson, a political subdivision of the State of South Dakota; Joyce Hicks, in her official capacity as Auditor of the County of Jackson; Steve Jeffords, Terry Oien; Keith Crew, in their official capacities as the County Commissioners for the County of Jackson,

Appellees.

Cheyenne River Sioux Tribe,
Amicus/appellant

Appeal from the United States District Court
for the District of South Dakota.

Submitted: February 12, 1985
Filed: August 15, 1985

Before ROSS and BOWMAN, Circuit Judges, and Oliver,* District Judge.

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*The HONORABLE JOHN W. OLIVER, Senior United States District Judge for the Western District of Missouri, sitting by designation.

ROSS, Circuit Judge.

The Oglala Sioux Tribe filed this suit seeking to set aside the consolidation of two South Dakota counties — Jackson and Washabaugh. Prior to the consolidation, Washabaugh County laid entirely within the Pine Ridge Indian Reservation of the Oglala Sioux Tribe and had been an unorganized county attached to Jackson County for governmental purposes. Washabaugh County was eliminated by the consolidation and the Jackson County boundaries were expanded to include the boundaries of Washabaugh County.

After a bench trial, the district court refused to grant the Tribe's requested injunctive and declarative relief and dismissed the case. The Tribe now appeals, arguing that the consolidation was unlawful because the mere existence of a state governmental entity on the reservation with general governmental powers, such as Jackson County, is preempted by federal law and impermissibly infringes upon the Tribe's right of self-government. We disagree with this broad contention. Accordingly, we affirm the district court's dismissal of this case.

FACTS

This suit arises from the abolition of South Dakota's unusual governmental scheme involving the division of counties into "organized" and "unorganized" counties. We have previously described this governmental scheme as follows:

> The State of South Dakota is divided, by S.D.C.L. §§ 7-1-2 through 7-1-68 (1967), into sixty-seven county units. For purposes of county administration and

> government, these sixty-seven counties are divided into organized and unorganized counties. S.D.C.L. § 7-4-1 (1967) recognized the validity of every county government operating as such on the date of South Dakota's admisison as a state. These became the first organized counties. Presumably all other counties were at that time designated as unorganized counties. A statutory method of organizing a county government, through petition and referendum, was also established and at the present time the only unorganized counties are * * * Todd, Washabaugh and Shannon.
>
> Each organized county has a full complement of elected county officials whose task it is to administer the affairs of local government. They include county commissioners, judges, clerk of court, register of deeds, auditor, treasurer, sheriff, coroner and attorney. The unorganized counties, however, do not elect these officials for themselves but rather are attached to an adjoining county for purposes of government and administration. The officials of the organized counties, under the provisions of S.D.C.L. §§ 7-17-3 (1967) and 7-17-5 (1974), administer the affairs of the attached unorganized counties and have all the powers and duties with regard to the attached county that they have in their own.

United States v. South Dakota, 636 F.2d 241, 242-43 (8th Cir. 1980), *cert. denied*, 452 U.S. 939 (1981) *(quoting Little Thunder v. South Dakota*, 518 F.2d 1253, 1254 (8th Cir. 1975)).

In our first encounter with South Dakota's county government scheme, we held that residents of unorganized counties could not be denied the right to vote in county elections of the attaching organized county. *Little Thunder v. South Dakota, supra.* We stated:

> In the instant case residents of the organized counties possess a substantial interest in the choice of county officials since those govern their affairs.

> Under the provisions of S.D.C.L. §§ 7-17-3 (1967) and 7-17-5 (1974) these officials exercise the same authority and are impressed with the same obligations towards the unorganized counties as towards their own organized county. The fact that plaintiffs are reservation Indians is not of great significance. While it is true that Todd, Washabaugh and Shannon counties lie totally within Indians reservations and that the state has limited jurisdiction over them, the effects of county government are not completely absent. Both Indians and non-Indians for example pay taxes on deeded land, whether within or without the reservation, and the tax rate is fixed by the county commissioners. S.D.C.L. §§ 10-12-10 (1967). The county sheriff is obligated to appoint a deputy sheriff to keep the peace in the unorganized counties. S.D.C.L. § 7-17-6 (1967). Indians and non-Indians living within the reservation record deeds and file documents just the same as their fellow citizens. We think it clear that officials of the organized county exercise substantial power over the affairs of individuals living in the unorganized counties.

Little Thunder v. South Dakota, supra 518 F.2d at 1256-58. In a subsequent case, we held that residents of unorganized counties could not be denied the right to run for office in the organized county to which their county was attached. *United States v. South Dakota, supra.*

Shortly after our decision in *Little Thunder*,[1] residents of Washabaugh County circulated petitions seeking to submit the issue of consolidating Washabaugh and Jackson Counties to the voters. *See* S.D. CODIFIED LAWS ANN.

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[1]In fact, the district court concluded that the *Little Thunder* decision "was a catalyst in commencing the consolidation procedure" involved in this case. *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. South Dakota*, Civ. 77-5020 (D.S.D. Dec. 27, 1983) (memorandum opinion).

§ 7-2-1 (1981 Rev.). The petition effort was successful and, in the November 1976 general election, the consolidation was approved by a majority of votes cast on the issue in both counties. *See* S.D. CODIFIED LAWS ANN. § 7-2-3 (1981 Rev.). The consolidation became effective on January 1, 1979.[2] *See* S.D. CODIFIED LAWS ANN. §§ 7-2-4, -5 (1981 Rev.).

Prior to the consolidation, Jackson County provided only the most fundamental services, such as the recordation of deeds and birth and death certificates, police protection, road maintenance, education, a judicial system, and the distribution of food stamps and veterans benefits. A comprehensive system of regulations and ordinances had not been implemented. The only change in county government since the consolidation which has come to our attention is the transfer of the responsibilities of the Washabaugh County Road Board to the Board of Commissioners of Jackson County. The district court relied upon this lack of change in government as support for its conclusion that no infringement on the tribal right of self-government had been established, stating:

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[2]The abolition of counties with unorganized status in South Dakota was completed when the two other unorganized counties, Todd and Shannon, were organized and established as governmental bodies independent of other counties by a bill passed by the South Dakota legislature in 1979 (H.B. 1197, 54 Sess.) which repealed the provisions of the South Dakota statutes relating to organized and unorganized counties. *See United States v. South Dakota*, 636 F.2d 241, 245 n.6 (8th Cir. 1980), *cert. denied*, 452 U.S. 939 (1981). A consent decree approving the organization of Todd and Shannon Counties was subsequently entered into. *See South Dakota v. United States*, No. 80-1976 (D.D.C. Nov. 1981).

> Even though Washabaugh County was unorganized, it still received governmental services through Jackson County, such as election procedures, land and vehicle title registration, roads, law enforcement involving non-Indians, and general county administrative activity. No serious claim is made or supported by any evidence that the governmental activities while Washabaugh County was unorganized infringed on plaintiff's rights to self-government. The consolidation did not increase the scope of state governmental activity in the Washabaugh County area, and therefore it did not infringe on the plaintiff's rights.
>
> No claim is made by the defendants, nor could any be made, that state jurisdiction over the Washabaugh County area is enlarged or extended in any manner by the consolidation. State jurisdiction remains now the same as before the consolidation.

Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. South Dakota, Civ. 77-5020 (D.S.D. Dec. 27, 1983) (memorandum opinion).

DISCUSSION

The basic principles for a case of this type were laid out in *Rice v. Rehner*, — U.S. —, 103 S.Ct. 3291 (1983), as follows:

> The decisions of this Court concerning the principles to be applied in determining whether state regulation of activities in Indian country is preempted have not been static. In *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561, 8 L.Ed. 483 (1832), Chief Justice Marshall wrote that an Indian reservation "is a distinct community, occupying its own territory, with boundaries accurately described, in which . . . [state laws] can have no force . . . ." Despite this early

> statement emphasizing the importance of tribal self-government, "*Congress has to a substantial degree opened the doors of reservations to state laws,* in marked contrast to what prevailed in the time of Chief Justice Marshall," *Organized Village of Kake v. Egan,* 369 U.S. 60, 74, 82 S.Ct. 562, 570, 7 L.Ed.2d 573 (1962). "*[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.*" *Mescalero Apache Tribe v. Jones,* 411 U.S. 145, 148, 93 S.Ct. 1267, 1270, 36 L.Ed. 114 (1973) * * * .

Id. at —, 103 S.Ct. at 3294 (emphasis added). On appeal, the Oglala Sioux Tribe relies primarily on the concept of federal preemption to attack the consolidation at issue, since

> [a]though "[f]ederal treaties and statutes have been consistently construed to reserve the right of self-government to the tribes," Cohen's Handbook of Fed-ederal Indian Law 273 (1982 * * * [, the Supreme Court's] recent cases have established a "trend . . . away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172, 93 S.Ct. 1257, 1262, 36 L.Ed.2d 129 (1973) (footnote omitted).

Id. at — , 103 S.Ct. at 3295.

Under a federal preemption analysis, we must "look * * * to the applicable treaties and statutes which define the limits of state power." *McClanahan v. Arizona State Tax Commission,* 411 U.S. 164, 172 (1973). The doctrine of Indian sovereignty is relevant, however, as a "back-drop against which the applicable treaties and federal statutes must be read." *Id.* If "we do not find * * * a tradition [of immunity or self-government], or if we de-

termine that the balance of state, federal, and tribal interests so requires, our pre-emption anlysis may accord less weight to the 'backdrop' of tribal sovereignty." *Rice v. Rehner, supra,* — U.S. at — , 103 S.Ct. at 3295.

In this case, the Tribe challenges the *existence* of a general purpose state governmental body on the reservation, rather than the *exercise* of specific state governmental jurisdiction on the reservation relating to a particular area such as taxation.[3] Thus, the tribal sovereignty interest which the Tribe seeks to protect here involves the broad right to be the exclusive governmental body on the reservation.

The Supreme Court has made it clear that state government is no longer *entirely* barred from the reservation. *See Rice v. Rehner, supra,* — U.S. at — . 103 S.Ct. at 3294; *McClanahan v. Arizona State Tax Commission, supra* 411 U.S. at 171 ("notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians."). Yet, by challenging the mere existence of a general purpose state governmental body on the reservation, the Tribe is seeking, in effect, to entirely oust the State of jurisdiction on the reservation. We do not perceive either tradition or the balance of state, federal, or tribal interests as supporting the broad generalization that states have no jurisdiction at all on reservations. Thus, the "backdrop" of tribal sovereignty involved in this case may be accorded less

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[3]The Tribe admits that this case is "unique from most other pre-emption cases dealing with state encroachment on Indian reservations" due to this broad challenge to state jurisdiction. Brief for Appellant Oglala Sioux Tribe at 2-3.

weight when we analyze the treaties and federal statutes involved in this case. *Rice v. Rehner, supra,* — U.S. at — . 103 S.Ct. at 3295.

The Tribe has alleged that the consolidation at issue here is preempted by either the Treaty of Fort Laramie. Apr. 29, 1868, 15 Stat. 635, or by the Enabling Act of Feb. 22, 1889, 25 Stat. 676.[4] Specifically, the Tribe emphasizes that the Treaty of Fort Laramie established the Great Reservation of the Sioux Nation "for the absolute and undisturbed use and occupation" of the Sioux Nation, including the Oglala Sioux Tribe, and provided that "no persons except those herein designated and authorized so to do * * * shall ever be permitted to pass over, settle upon, or reside in the territory" encompassed within the reservation. Treaty of Fort Laramie, Apr. 29, 1868, Art. II. 15 Stat. 635, 636. In regards to the Enabling Act, the Tribe emphasizes that the Act required South Dakota to "disclaim all right and title * * * to all lands lying within * * * [South Dakota] owned or held by any Indian or Indian tribes" in order to obtain statehood, Enabling Act of Feb. 22, 1889, s 4, cl. 2, 25 Stat. 676, 677, and that, in fact, the required disclaimer was made by South Dakota. *See* S.D. Const. Art. XXII, cl. 2.

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[4]The Tribe has also cited the Dakota Territory Organic Act, Mar. 2, 1861, 12 Stat. 239, the Indian Reorganization Act of 1934, 25 U.S.C. § 461-479 (1982), South Dakota's refusal to accept jurisdiction over Indian contry by adopting Public Law 280, Act of Aug. 15, 1953, 67 Stat. 588 (codified in part as 18 U.S.C. § 1162 (1982) and 28 U.S.C. § 1360 (1982)), *see White v. Califano,* 437 F.Supp. 543, 561-63 (D.S.D. 1977), *aff'd,* 581 F.2d 697 (8th Cir. 1978) (history of South Dakota's refusal to assume jurisdiction via Public Law 280 discussed), and other various treaties and statutes as supporting the doctrine of tribal self-government. We find no need to separately discuss each of these treaties and statutes.

The Tribe's reliance on the Enabling Act for the proposition that the Pine Ridge Indian Reservation is entirely beyond state jurisdiction is misplaced since "the presence or absence of specific jurisdictional disclaimers [in statehood enabling acts] has rarely been dispositive in * * * [the Supreme Court's] consideration of state jurisdiction over Indian affairs or activities on Indian Lands." *Arizona v. San Carlos Apache Tribe of Arizona*, — , US. —, — , 103 S.Ct. 3201, 3211 (1983). The reason for the insignificant nature of such disclaimers in preemption cases is that "disclaimer[s] of right and title by the State[s] * * * [are] disclaimer[s] of proprietary rather than governmental interest" and the "absolute" jurisdiction and control over reservations typically given to the United States by such disclaimers means "undiminished, not exclusive" control. *Kake Village v. Egan*, 369 U.S. 60, 69, 71 (1962).

We are also not persuaded by the Tribe's reliance on the Treaty of Fort Laramie for the proposition that the consolidation at issue here is preempted by federal law. The Tribe's argument boils down to the proposition that the State can have no jurisdiction in the reservation because the Tribe is the exclusive owner of all land on the reservation and because all non-Indians who are on the reservation are there in violation of the Treaty of Fort Laramie. We reject this proposition and accordingly, reject the Tribe's preemption argument.[5] First, the

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[5]The State has argued that the pertinent provisions of the Treaty of Fort Laramie relied upon by the Tribe were repealed or modified by an allotment act passed in 1889. Act of Mar. 2,

(Continued on following page)

question of who owns the land on the reservation is clearly irrelevant to the inquiry at hand. Second, non-Indians *are* on the reservation and the illegality of their presence on the reservation cannot serve to entirely oust the State of jurisdiction on the reservation.

The Tribe also argues that the consolidation at issue here impermissibly infringes upon their right of self-government. *See Williams v. Lee*, 358 U.S. 217, 220 (1950) ("absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them"). The Tribe suggests three ways in which the consolidation of the counties *might* affect tribal

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(Continued from previous page)

1889, 25 Stat. 888. This Act permitted the various bands of the Sioux Nation to divide the Great Reservation of the Sioux Nation into separate reservations, such as the Pine Ridge Indian Reservation, section 1, 25 Stat. at 888, and authorized the allotment of such subdivisions amongst the Indians. Section 8, 25 Stat. at 890.

The Oglala Sioux Tribe argues that this Act did not affect the Treaty of Fort Laramie because the Act was never accepted and consented to by the Oglalas as required by the Act. Section 28, 25 Stat. at 899. The State responds that the Act was accepted and consented to by the Oglalas, and that, in fact, a presidential proclamation had been issued declaring that the Act had become effective. Proclamation No. 9, Feb. 10, 1890, 26 Stat. 1554.

Due to our conclusion that the consolidation at issue is not preempted even if the Treaty of Fort Laramie was not modified by the 1889 Allotment Act, we need not determine whether the 1889 Allotment Act was accepted and consented to by the Oglalas as required by that Act. *See Oglala Sioux Tribe of the Pine Ridge Reservation v. South Dakota*, Civ. 77-5020 (D.S.D. December 27, 1983) (memorandum opinion) ("it is unnecessary to consider or determine the issue of whether the federal government acted properly in allotting land within the Pine Ridge Indian Reservation").

self-government: 1) the consolidated county may compete with the Tribe for federal funding,[6] 2) the consolidated county will have authority under state statutes to perform various public acts which are within the Tribe's jurisdiction, and 3) tribal self-government may be harmed by a dual system in which the Tribe would be governed by tribal law and non-Indians would be governed by state and county law.

The key word in the Tribe's argument is "might". The Tribe has failed to establish that any of the *potential* threats to their right of tribal self-government which are arguably engendered by the consolidation have actually infringed upon their right of self-government. Thus, we find that the consolidation of Washabaugh and Jackson Counties has not impermissibility infringed upon the Tribe's right of self-government.

CONCLUSION

We find that the mere existence of a general purpose state governmental body on the reservation is not preempted by federal law and does not impermissibly infringe upon tribal self-government. Accordingly, we affirm the district court's dismissal of this case.

We add that, in the final analysis, this case involved an action in which only exceedingly broad and vague claims

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[6]The district court specifically rejected this contention stating: "Neither the evidence herein nor the offer of proof * * * suggests that the consolidation of these counties affects the problem of competition over federal funding in any manner." *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. South Dakota*, Civ. 77-5020 (D.S.D. Dec. 27, 1983) (memorandum opinion).

of potential conflict with tribal sovereignty and federal treaties and statutes were asserted. *Cf Cass County v. United States*, 570 F.2d 737 (8th Cir. 1978) (declaratory action seeking general declaration as to governmental rights between state and tribe on a reservation dismissed for lack of justiciable controversy due to lack of specificity of conflict). The mere consolidation of Jackson and Washabaugh Counties has caused no injury to the Tribe and accordingly, we give no relief to the Tribe. We emphasize, however, that our decision in this case does not foreclose the Tribe from seeking relief from specific action by the consolidated Jackson County which may unlawfully interfere with the Tribe's rights.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHT CIRCUIT

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV 77-5020

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Plaintiff,

vs.

STATE OF SOUTH DAKOTA, etc, et al.,

Defendants.

APPEARANCES:

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For the Defendant Jackson County	Mr. Robert Sambroak, Jr. States Attorney P. O. Box 400 Kadoka, SD 57543
For all individual Defendants listed	William W. Shakely Attorney at Law 1875 Connecticut Ave., NW Washington, DC 20009

MEMORANDUM OPINION

Washabaugh County was for many years an unorganized county in the State of South Dakota, and was attached to Jackson County for judicial and administrative purposes. Pursuant to S.D.C.L. 7-2, and after elections were held in Jackson County and Washabaugh County in the General Election of 1976, Washabaugh County was merged into and consolidated with Jackson County effective January 1, 1979, and the resulting county is known as Jackson County.

Washabaugh County lies wholly within the Pine Ridge Indian Reservation. The plaintiff brought this action to set aside the consolidation of these counties, and for other relief.

Plaintiff asserts herein that the consolidation was and is void because (1) all allotments of land on the Pine Ridge Indian Reservation were illegally made by the federal government, and as a result of which the plaintiff owns all land in Washabaugh County, (2) Washabaugh County is extraterritorial to the State of South Dakota, (3) county government infringes upon tribal self-government, (4) organization of Washabaugh County violates current International Human Rights Covenants, and (5) that members of the Oglala Sioux Tribe are not citizens of South Dakota.

I conclude that the ultimate issues herein are whether the consolidation of Washabaugh and Jackson Counties interferes with plaintiff's right to self-government or is prohibited by federal law. If the answer to either is yes, the plaintiff would be entitled to the relief sought.

Upon the evidence herein, and the briefs of the parties, I conclude that the answer is no to each issue, and that the defendants are entitled to the judgment herein.

Underlying this case is the concept of governmental jurisdiction in the area referred to herein as Washabaugh County. It is within the closed portion of the Pine Ridge Indian Reservation and as such, plaintiff has substantial governmental rights therein. Washabaugh County also lies within the territorial boundaries of the State of South Dakota, and as a result, the State has some governmental rights therein. Application of these differing governmental rights to specific fact situations has over the years resulted in tension and considerable litigation, both in South Dakota and elsewhere. Plaintiff seeks to eliminate this tension in Washabaugh County by ousting State juris-

diction completely. While this solution would be simple, it is neither mandated nor permitted by federal law.

1. Land Allotments

Plaintiffs assert both in this case and a companion case of *Oglala Sioux Tribe v. Hancock, et al.*, CIV 80-5061, that the land allotments on the Pine Ridge Indian Reservation were issued in violation of treaty rights. As a consequence, plaintiff claims exclusive ownership of all land in Washabaugh County. I conclude that it is unnecessary to consider or determine the issue of whether the federal government acted properly in alloting land within the Pine Ridge Indian Reservation, and I decline to do so.

2. Extra-territorial

Plaintiff contends that Washabaugh County is extra-territorial to the State of South Dakota because of Section 4 of the Act of February 22, 1889 (25 Stat. 676) and the Constitution of South Dakota, Article XXII, in which the State disclaimed all right and title to Indian land. This disclaimer affects proprietary interests rather than governmental interests. *Organized Village of Kake v. Egan*, 369 U.S. 60, 82 S.Ct. 562, 7 L.Ed.2d 53 (1962). The disclaimer has no relevance to the issues in this action. *Arizona v. San Carlos Apache Tribe of Indians*, — U.S. —, 103 S.Ct. 3201, 77 L.Ed.2d 837 (1983).

3. Infringement of Tribal Rights

Plaintiff claims that the consolidation infringes on its right to self-government because (a) an attempt to exercise statutory county functions in Washabaugh County

would infringe on plaintiff's rights and (b) it might allow the State to obtain federal funds that would othewise go to the plaintiff.

Even though Washabaugh County was unorganized, it still received governmental services through Jackson County, such as election procedures, land and vehicle title registration, roads, law enforcement involving non-Indians, and general county administrative activity. No serious claim is made or supported by any evidence that the government activities while Washabaugh County was unorganized infringed on plaintiff's rights to self-government. The consolidation did not increase the scope of state governmental activity in the Washabaugh County area, and therefore, it did not infringe on the plaintiff's rights.

No claim is made by the defendants, nor could any be made, that state jurisdiction over the Washabaugh County area is enlarged or extended in any manner by the consolidation. State jurisdiction remains now the same as before the consolidation.

Plaintiff argues that the State obtains federal funding for programs that should be funded through the plaintiff. Neither the evidence herein nor the offer of proof made as to Patrick C. Allison, Regional Director, Department of Health and Human Services, Denver, Colorado, suggests that the consolidation of these counties affects the problem of competition over federal funding in any manner.

4. International Rights

Plaintiff asserts that the consolidation violates internationally recognized rights of self-determination, as set out in Exhibits 98 and 99. Since it is my opinion that the

evidence herein does not establish any impairment of the plaintiff's right of self-government by virtue of the consolidation, it follows that no internationally recognized rights are violated thereby.

5. Citizenship of South Dakota

Plaintiff asserts that members of the Oglala Sioux Tribe and descendants thereof are not citizens of the State of South Dakota. While there was a period when Indians were not considered citizens of either the United States or any individual state, that time has long passed. Members of the Oglala Sioux Tribe residing in Washabaugh County were adjudged to be citizens of South Dakota and thereby entitled to vote, not only for state and federal officials, but also for county officials in *Little Thunder v. State of South Dakota,* 518 F.2d 1253 (8th Cir. 1975). In fact, it appears from the evidence presented at trial that this decision was a catalyst in commencing the consolidation procedures.

I conclude from the evidence herein that the consolidation of Jackson and Washabaugh Counties does not violate any federal laws, nor does it infringe on the rights of the plaintiff to tribal self-government. Neither does it expand in any manner state jurisdiction over that part of the Pine Ridge Indian Reservation known as Washabaugh County and now lying within Jackson County.

Judgment will be entered herein for the defendants.

Dated this 27th day of December, 1983.

United States District Judge
John B. Jones

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV 77-5020

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

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For all individual Defendants listed	Mr. William W. Shakely Attorney at Law 1875 Connecticut Ave., NW Washington, DC 20009

SUPPLEMENTAL MEMORANDUM OPINION

Plaintiff has made a Motion to Amend and Supplement Court's Memorandum Opinion and Judgment under Rule 52. The parties have submitted briefs thereon.

Plaintiff's motion requests consideration of the issue of federal preemption to state law on Indian reservations in general, and by brief, plaintiff has asserted that 48 U.S.C. §-1451 preempts state jurisdiction in Washabaugh County both prior to and subsequent to the merger in issue here.

Title 48 of the United States Code relates to territories and insular possessions of the United States. South Dakota is neither, since is was admitted to statehood in 1889. Title 48 has no application to any of the issues herein.

Federal law preempts most areas of jurisdiction over Indian people on closed reservations such as the Pine Ridge Indian Reservation. Any attempt to increase state jurisdiction over that presently permitted by federal law

would be preempted. Since it clearly appears that the consolidation of Washabaugh County into Jackson County does not increase or change state jurisdiction over Indian people in any way, it is not preempted or prohibited by federal law.

There are persons, both Indian and non-Indian, who have patented fee title to land located in former Washabaugh County. Those people require a place to register their land titles, and the State is required to provide such a place. The persons residing in former Washabaugh County, both Indian and non-Indian, need facilities and the opportunity to vote in federal, state and local elections, and the State is required to provide them. There are persons living in former Washabaugh County, both Indian and non-Indian, who are entitled to participate in the food stamp program administered through the county government in South Dakota, and the State must provide access to that program.

While there is virtually no state jurisdiction over Indian people residing on the reservation, there is substantial state jurisdiction over non-Indians living there. There are some state services that Indian people residing on the reservation are entitled to receive. To fulfill these responsibilities, there is a need for some form of state governmental organization in former Washabaugh County. That was formerly provided through giving Washabaugh County unorganized county status. I don't believe there was any serious claim in this case that the unorganized county status of Washabaugh County violated federal law. Since consolidation of Washabaugh County with Jackson County did not increase state jurisdiction over Indian people, it

neither violated federal law nor infringed upon the rights of Indian people to tribal self-government.

The plaintiff's motion will be denied, and I adhere to the judgment previously entered herein.

Dated this 29th day of June, 1984.

/s/ John B. Jones
United States District Judge

APPENDIX D

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

AMENDMENT 15

Section 1. Right of citizens to vote—Race or color not to disqualify.

The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

APPENDIX E

1825 TREATY WITH THE SIOUNE AND OGALLALA TRIBES

For the purpose of perpetuating the friendship which has heretofore existed, as also to remove all future cause of discussion or dissension, as it respects trade and friendship between the United States and their citizens, and the Sioune and Ogallala bands of the Sioux Indians, the President of the United States of America, by Brigadier-General Henry Atkinson, of the United States' Army, and Major Benjamin O'Fallon, Indian Agent, with full powers and authority, specially appointed and commissioned for that purpose, of the one part, and undersigned Chiefs, Head-men, and Warriors, of the said Sioune and Ogallala bands of the Sioux-Indians, on behalf of their bands, of the other part, have made and entered into the following articles and conditions, which, when ratified by the President of the United States, by and with the advice and consent of the Senate, shall be binding on both parties,—to wit:

ARTICLE 1

It is admitted by the Sioune and Ogallala bands of the Sioux Indians, that they reside within the territorial limits of the United States, ackknowledge their supremacy, and claims their protection. The said bands also admit the right of the United States to regulate all trade and intercourse with them.

APPENDIX F

1851 TREATY OF FORT LARAMIE

Articles of a treaty made and concluded at Fort Laramie, in the Indian Territory, between D.D. Mitchell, superintendent of Indian affairs, and Thomas Fitzpatrick, Indian agent, commissioners specially appointed and authorized by the President of the United States, of the first part, and the chiefs, headmen, and braves of the following Indian nations, residing south of the Missouri River, east of the Rocky Mountains, and north of the lines of Texas and New Mexico, viz, the Sioux or Dahcotahs, Cheyennes, Appapahoes, Crows, Assinaboines, Gros-Ventre Mandans, and Arrickaras, parties of the second part, on the seventeenth day of September, A.D. one thousand eight hundred and fifty-one.

* * * * * * *

ARTICLE 5.

The aforesaid Indian nations do hereby recognize and acknowledge the following tracts of country, included within the metes and boundaries hereinafter designated, as their respective territories, viz:

The territory of the Sioux or Dahcotah Nation, commencing the mouth of the White Earth River, on the Missouri River; thence in a southwesterly direction to the forks of the Platte River; thence up the north fork of the Platte River to a point known as the Red Bute, or where the road leaves the river; thence along the range of mountains known as the Black Hills, to the head-waters of Heart River, and thence down Heart River to the place of beginning.

* * * * * * *

APPENDIX G

1865 TREATY WITH THE SIOUX— OGLALA BAND

Articles of a treaty made and concluded at Fort Sully, in the Territory of Dakota, by and between Newton Edmunds, governor and ex-officio superintendent of Indian affairs of Dakota Territory, Edward B. Taylor, superintendent of Indian affairs for the northern superintendency, Major-General S.R. Curtis, Brigadier-General, H.H. Sibley, Henry W. Reed, and Orrin Guernsey, commissioners on the part of the United States, duly appointed by the President, and the undersigned chiefs and head-men of the O'Galla band of Dakota or Sioux Indians.

ARTICLE 1.

The O'Galla band of Dakota or Sioux Indians, represented in council, hereby acknowledge themselves to be subject to the exclusive jurisdiction and authority of the United States, and hereby obligate and bind themselves, individually and collectively, not only to cease all hostilities against the persons and property of its citizens, but to use their influence, and, if necessary, physical force, to prevent other bands of the Dakota Indians, or other adjacent tribes, from making hostile demonstrations against the Government or people of the United States.

APPENDIX H

TREATY WITH THE SIOUX—BRULE, OGLALA, MINICONJOU, YANKTONAI, HUNKPAPA, CUTHEAD, TWO KETTLE, SAN ARC, AND SANTEE—AND ARAPAHO, 1868

* * * * * *

ARTICLE II

The United States agrees that the following district of country, to wit, viz: commencing on the east bank of the Missouri River where the forty-sixth parallel of north latitude crosses the same, thence along low-water mark down said east bank to a point opposite where the northern line of the State of Nebraska strikes the river, thence west across said river and along the northern line of Nebraska to the one hundred and fourth degree of longitude west from Greenwich, thence north on said meridian to a point where the forty-sixth parallel of north latitude intercepts the same, thence due east along said parallel to the place of beginning; and in addition thereto, all existing reservations on the east bank of said river shall be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employees of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in

the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians, and henceforth they will and do hereby relinquish all claims or right in and to any portion of the United States or Territories, except such as is embraced within the limits aforesaid, and except as hereinafter provided.

ARTICLE 12.

No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three-fourths of all the adult male Indians, occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him, as provided in article 6 of this treaty.

* * * * *

APPENDIX I

1861 DAKOTA TERRITORY ORGANIC LAW

(Act of March 2, 1861, Ch. 86, 12 Statutes at Large 239).

An act to provide a temporary government for the territory of Dakota, and to create the office of surveyor general therein.

Be it enacted by the senate and house of representatives of the United States of America in Congress assembled, That all that part of the territory of the United States included within the following limits, namely: commencing at a point in the main channel of the Red River of the North, where the forty-ninth degree of north latitude crosses the same; thence up the main channel of the same, and along the boundary of the state of Minnesota, to Big Stone lake; thence along the boundary line of the said state of Minnesota to the Iowa line; thence along the boundary line of the state of Iowa to the point of intersection between the Big Sioux and Missouri rivers; thence up the Missouri River, and along the boundary line of the territory of Nebraska, to the mouth of the Niobrara or running Water river; thence following up the same, in the middle of the main channel thereof, to the mouth of the Keha Paha or Turtle Hill river; thence up said river to the forty-third parallel of north latitude; thence due west to the present boundary of the territory of Washington; thence along the boundary line of Washington territory, to the forty-ninth degree of north lati-

tude to the place of beginning, be, and the same is hereby organized into a temporary government, by the name of the territory of Dakota: provided, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any state of territory; but all such territory shall be excepted out of the boundaries and constitute no part of the territory of Dakota, until said tribe shall signify their assent to the president of the United States to be included within the said territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed: provided further, that nothing in this act contained shall be construed to inhibit the government of the United States from dividing said territory into two or more territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other territory or state.

* * * * * * *

APPENDIX J

THE 1871 ACT PROVIDING THAT NO FUTURE TREATIES WILL BE MADE WITH INDIAN TRIBES.

Treaties.

Sec. 71. Future treaties with Indian tribes. —No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March 3, 1871, shall be hereby invalidated or impaired. (R.S. §2079.)

APPENDIX K

1877 ACT RATIFYING AGREEMENT WITH SIOUX INDIANS, NORTHERN ARAPAHO AND CHEYENNE INDIANS

* * * * * *

Article 8. The provisions of the said treaty of 1868, except as herein modified, shall continue in full force, and, with the provisions of said agreement, shall apply to any country which may hereafter be occupied by the said Indians as a home; and Congress shall, by appropriate legislation, secure to them an orderly government; they shall be subject to the laws of the United States, and each individual shall be protected in his rights or property, person and life.

* * * * * *

APPENDIX L

1889 SOUTH DAKOTA ENABLING ACT

(Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676.)

* * * * * * * * *

Sec.4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said territorities, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July 1889, and after organization, shall declare on behalf of the people of said proposed states, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby authorized to form constitutions and state governments for said proposed states, respectively. The Constitution shall be republican in form, and make no distinction in civil or political rights on account of race, color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said convention shall provide by ordinances irrevocable without the consent of the United States and the people of said states:

First. That perfect toleration of religious sentiment shall be secured, and that no inhibitant of said states shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by an Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said states shall never be taxed at a higher rate than the lands belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe.

* * * * * * *

APPENDIX M

1889 ACT

CHAP. 405. — An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations and to secure the relinquishment of the Indian title to the remainder, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following tract of land, being a part of the Great Reservation of the Sioux Nation, in the Territory of Dakota, is hereby set apart for a permanent reservation for the Indians receiving rations and annuities at the Pine Ridge Agency, in the Territory of Dakota, namely: Beginning at the intersection of the one hundred and third meridian of longtitude with the northern boundary of the State of Nebraska; thence north along said meridian to the South Fork of Cheyenne River, and down said stream to the mouth of Battle Creek; thence due east to White River; thence due south to said north line of the State of Nebraska; thence west on said north line to the place of beginning. Also, the following tract of land situated in the State of Nebraska, namely: Beginning at a point on the boundary-line between the State of Nebraska and the Territory of Dakota where the range line between ranges forty-four and forty-five west of the sixth principal meridian, in the Territory of Dakota, intersects said boundaries-line; thence east along said boundary-line five miles; thence due south five miles; thence due west ten miles; thence due north to said boundary-line; thence due east along said boundary-line to the place

of beginning: *Provided,* That the said tract of land in the State of Nebraska shall be reserved, by Executive order, only so long as it may be needed for the use and protection of the Indians receiving rations and annuities at the Pine Ridge Agency.

* * * * * *

Sec. 16. That acceptance of this act by the Indians in manner and form as required by the said treaty concluded between the different bands of the Sioux Nation of Indians and the United States, April twenty-ninth, eighteen hundred and sixty-eight, and proclaimed by the President February twenty-fourth, eighteen hundred and sixty-nine, as hereinafter provided, shall be taken and held to be a release of all title on the part of the Indians receiving rations and annuities on each of the said separate reservations, to the lands described in each of the other separate reservations so created, and shall be held to confirm in the Indians entitled to receive rations at each of said separate reservations, respectively, to their separate and exclusive use and benefit, all the title and interest of every name and nature secured therein to the different bands of the Sioux Nation by said treaty of April twenty-ninth, eighteen hundred and sixty eight. * * * * * *

Sec. 19. That all the provisions of the said treaty with the different bands of the Sioux Nation of Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, and the agreement with the same approved February twenty-eighth, eighteen hundred and seventy-seven, not in conflict with the provisions and requirements of this act, are hereby continued in force according to their tenor and limitation, anything in this act to the contrary notwithstanding.

* * * * * *

Sec. 28. That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the treaty between the United States and said Sioux Indians concluded April twenty-ninth, eighteen hundred and sixty-eight, which said acceptance and consent, shall be made known by proclamation by the President of the United States, upon satisfactory proof presented to him, that the same has been obtained in the manner and form required, by said twelfth article of said treaty; which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

APPENDIX N

1924 INDIAN CITIZENSHIP ACT

BE IT ENACTED BY THE SENATE AND HOUSE REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States: Provided that the granting of such citizenship shall not in any manner impair or otherwise affect the right of any Indian to tribal or other property.

APPENDIX O

TITLE 25, UNITED STATES CODE

Sec. 349. Patents in fee to allottees

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section 348 of this title, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law: *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the former Indian Territory.

Sec. 462. Existing periods of trust and restrictions on alienation extended

The existing periods of trust placed upon any Indian lands and any restriction on alienation thereof are hereby extended and continued until otherwise directed by Congress.

Sec. 476. Organization of Indian tribes; constitution and bylaws; special election

Any Indian tribe, or tribes, residing on the same reservation shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal counsel the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assests without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates of Federal projects for the benefit of the tribe prior to the submission of such estimates to the Office of Management and Budget and the Congress.

Sec. 478. Acceptance of sections 461 to 479 optional

Sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 475, 476 to 478, and 479 of this title shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application. It shall be the duty of the Secretary of the Interior, within one year after June 18, 1934, to call such an election, which election shall be held by secret ballot upon thirty days' notice.

Sec. 1322. Assumption by State of civil jurisdiction

(a) Consent of United States; force and effect of civil laws

The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

Sec. 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this subchapter. The provisions of this subchapter shall not become effective with respect to such assumption of jurisdiction by such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

Sec. 1326. Special election

State jurisdiction acquired pursuant to this subchapter with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults.

APPENDIX P

SOUTH DAKOTA CONSTITUTION

ARTICLE XXII

COMPACT WITH THE UNITED STATES

The following article shall be irrevocable without the consent of the United States and the people of the state of South Dakota expressed by their legislative assembly:

* * * * * *

Second. That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the State of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States,

or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

APPENDIX Q

SOUTH DAKOTA CODIFIED LAWS, SECTIONS 10-12-9, 10-12-10 AND 10-12-23

Section 10-12-9. Purpose Included in County General-Purpose Levy.

The levy of county taxes pursuant to Section 10-12-8 shall include the following purposes:

(1) For general county purposes, including tree bounties;

(2) For the support of the mentally ill;

(3) For the special salary fund;

(4) For county roads, in addition to the road taxes levied by the several civil townships, cities, and incorporated towns and it shall have the entire supervision of the expenditure of such taxes. In all cities and incorporated towns, twenty-five percent of the money raised within said cities or towns for county roads shall be paid by the county treasurer to the treasurer of said city or town to be expended by the governing body of said city or town for bridge and street purposes within said city or town;

(5) For fire guards in territory not organized into city townships, to be levied against the taxable property of such unorganized territory;

(6) For county bridges;

(7) For county interests and sinking fund such an amount as will pay one year's interest on the bond indebtedness of the county, with not to exceed fifteen percent of the principle, the money from which tax shall be

applied to no other purpose than the payment of outstanding bonds and interest on the same, until such bond and interest are fully paid, when any surplus remaining shall be transferred to the county general fund;

(8) For county park improvements and maintenance, and the revenue so collected shall be deposited with the county treasurer in a fund to be designated as the county park fund;

(9) For support of the poor, not to exceed two mills on the dollar of the assessed valuation of all property within the county and the revenue so collected shall be deposited with the county treasurer in a fund to be designated as the county poor relief fund, and the total limitation per county levy as provided in Section 10-12-21, shall not be construed to prohibit such levy, nor shall be construed to prohibit such levy, nor shall the provision of Sections 7-21-34, 7-21-48 and 7-21-49 apply to this fund, nor any statute providing or authorizing transfer of unexpected balances to any other fund.

Section 10-12-10. Annual Levy for General Purposes of Unorganized County — Purposes Covered.

The board of county commissioners of each organized county to which any unorganized county is attached for state, judicial, or other purposes, shall at the time and in the manner specified in Section 10-12-8 levy taxes on all taxable property assessable in each unorganized county, for the following purposes only:

(1) For all costs of criminal prosecution arising in such unorganized county;

(2) For support of the mentally ill such an amount as may be due the state or county for the support of the mentally ill from such unorganized county, including expenses and costs in mental illness cases arising in such unorganized county;

(3) For all costs of general and primary elections, and assessment, extension, and collection of taxes in such unorganized counties;

(4) For additional salary for the state's attorney and county judge of the organized county, in such amount as is or may hereafter be allowed by law;

(5) For the support and relief of the poor.

Section 10-12-23. Maximum Unorganized County Levy for General Purposes — Additional Levy by Unanimous Vote of County Commissioners.

The total annual tax levy for all purposes, except school and highway purposes, in any unorganized county shall not exceed five mills on the dollar of the assessed valuation for the current year; provided that the state tax levy shall not be included in or limited by this section. Provided further that if, in the judgment of the county board, the amount of taxes which may be levied under the rates limited by this section will be insufficient to meet the needs of any unorganized county having a population of forty-five hundred or more inhabitants by the last federal census for the current year, the county commissioner may by unanimous vote, provide for an additional levy of two mills on the dollar of assessed valuation.

APPENDIX R

CONSTITUTION AND BY-LAWS OF THE OGLALA TRIBE OF THE PINE RIDGE RESERVATION OF SOUTH DAKOTA

PREAMBLE

We, the Oglala Sioux Tribe of the Pine Ridge Indian Reservation, in order to establish a more perfect organization, promote the general welfare, conserve and develop our lands and resources, secure to ourselves and our posterity the power to exercise certain rights of home rule not inconsistent with Federal laws and our treaties, and in recognition of God Almighty and His Divine Providence, do ordain and establish this constitution for the Oglala Sioux Tribe.

ARTICLE I — TERRITORY

The jurisdiction of the Oglala Sioux Tribe of Indians shall extend to the territory within the original confines of the Pine Ridge Indian Reservation boundaries, as defined by the act of March 2, 1889 (25 Stat. L. 888), and to such other lands as may be hereafter added thereto under any law of the United States except as may be otherwise provided by the law for unrestricted lands.

* * * * * *

ARTICLE IV — POWERS OF THE COUNCIL

Section 1. Enumerated power — the Oglala Sioux Tribal Council shall exercise the following powers, subject to any limitations imposed by the statutes or the Con-

stitution of the United States and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws.

(h) To lexy taxes upon members of the Oglala Sioux Tribe and to require the performance of community labor in lieu thereof, and to levy taxes or license fees, subject to review by the Secretary of the Interior, upon nonmembers doing business within the reservation.

(p) To regulate the inheritance of property, real and personal, other than allotted lands, within the territory of the Pine Ridge Reservation, subject to review by the Secretary of the Interior.

APPENDIX S

EXCERPTS FROM TRIAL TRANSCRIPT

Testimony of Robert Holcomb on Cross Examination

Q. [By Mr. Mustone]: Mr. Holcomb, you testified that the county has no jurisdiction over Indians within old Washabaugh County, is that correct?

A. [By Mr. Holcomb]: That['s] correct.

Q. Did the consolidation authorize the county to assume jurisdiction over Indians within old Washabaugh County?

A. No, sir.

Transcript, pages 375-76.

Testimony of Robert Holcomb on Redirect Examination

Q. [By Mr. Flores]: And it is your testimony, sir, that there has been no additional services rendered to Washabaugh County, other than the roads possibly being a little better now. * * * *

A. [By Mr. Holcomb]: We increased the efficiency of the roads, we think. We provided your ability or your privilege to vote, that you didn't have.

Q. And my question is this: Can you tell us why, first of all you have indicated there is no other jurisdiction over Indians, why Indians were taxed more now when they weren't receiving more services after consolidation?

A. I don't think the percentage of taxes changed a great deal in Washabaugh County after the consolidation

or due to the consolidation, anyway. If there was any increase, it was very small and the inflation would have probably have been the main factor.

Q. I want to refer you, sir, to Interrogatories that were submitted to you and your lawyers . . . Question 9 reads

> "Since January 1, 1979, has Jackson County equalized property taxes within the area referred to in this lawsuit as Washabaugh County to be commensurate with property taxes in Jackson County? If so, has this resulted in an increase in property taxes in Washabaugh County? Has it resulted in a decrease in property taxes in Jackson County?

Let me read your answer upon which you signed . . . Your answer is as follows:

> "The assessed valuations of Jackson and Washabaugh Counties were equalized approximately seven years ago, as an area in both counties were in the same school district. The mill levy imposed on taxable real estate is and was as follows: Original Jackson County area, 10.13. Post-merger, 7.31. Former Washabaugh County area, 7.90. Post-merger, 8.3."

Q. Sir, can you tell me whether this refreshes your recollection now as to whether or not the tax rate in Jackson County to the north ended up being reduced as a result of bringing in Washabaugh County to the south.

A. If there was, the change was very minimal.

Transcript, pages 378-79.

Testimony of Vicki Wilson on Direct Examination

Q. [By Mr. Flores]: Does the county currently levy property taxes on land within the County of Jackson?

A. [By Mrs. Wilson]: Yes, on deeded property.

* * * * * *

Q. An could you give me the approximate mills per this category?

* * * * * *

A. For 1984 the mill levy will be 21.53.

Transcript, pages 412-13.

APPENDIX T

S. 111

62D CONGRESS

1st Session.

IN THE SENATE OF THE UNITED STATES

April 6, 1911.

Mr. Gamble introduced the following bill; which was read twice and referred to the Committee on Indian Affairs.

A BILL

To authorize the sale and disposition of the surplus and unallotted lands in Washabaugh County, in the Pine Ridge Indian Reservation, in the State of South Dakota, and making appropriation to carry the same into effect.

BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Secretary of the Interior be, and he is hereby, authorized and directed, as hereinafter provided, to sell and dispose of all that portion of the Pine Ridge Indian Reservation, in the State of South Dakota, lying and being in Washabaugh County and described as follows, to wit: Commencing at a point on the eastern boundary line of the Pine Ridge Indian Reservation, in the State of South Dakota, where the same intersects the boundary line be-

tween townships thirty-nine and forty; thence west on said last-named boundary line to a point where the same intersects the fifth guide meridian; thence north on the fifth guide meridian to a point where the same intersects the main channel of the White River; thence in an easterly direction down and along the center of the main channel of the White River, and including all islands therein, to a point where the same crosses the eastern boundary line of the Pine Ridge Indian Reservation; thence south on the eastern boundary line of the said Pine Ridge Indian Reservation to the point of beginning, except such portions thereof as have been or may be hereafter allotted to Indians or otherwise reserved, and except lands classified as timber lands: PROVIDED, That any Indians to whom allotments have been made on the tract to be ceded may, in case they elect to do so before said lands are offered for sale, relinquish same and select allotments in lieu thereof on the dimished reservation: AND PROVIDED FURTHER, That the Secretary of the Interior may reserve such lands as he may deem necessary for agency, school, and religious purposes, to remain reserved as long as needed, and as long as agency, school, or religious institutions are maintained thereon for the benefit of said Indians: AND PROVIDED FURTHER, That the Secretary of the Interior is hereby authorized and directed to issue a patent in fee simple to the duly authorized missionary board or other authority of any religious organization heretofore engaged in mission or school work on said reservation for such lands thereon (not included in any town site hereinafter provided for) as have heretofore been set apart to such organization for mission or school purposes.

* * * * * * *

85-945 (2)

Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

THE STATE OF SOUTH DAKOTA, et al.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF JACKSON COUNTY, SOUTH DAKOTA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

40 p

QUESTION PRESENTED FOR REVIEW

Whether the consolidation of two of its counties by the State of South Dakota is prohibited by federal law or infringes on the Oglala Sioux Tribe's right of self-government when the consolidation includes a portion of the Pine Ridge Indian Reservation.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals which is the subject of this petition for writ of certiorari is reported at 770 F.2d 730 (1985). The opinion of the United States District Court granting judgment in favor of the Respondents and affirmed by the Eighth Circuit was unpublished.

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Pursuant to Rule 34.1(b) of the Rules of the Supreme Court of the United States, the following is a list of all parties to the proceedings before the Eighth Circuit Court of Appeals: the Oglala Sioux Tribe, Appellant; the State of South Dakota; Jackson County, South Dakota, a political subdivision of the State of South Dakota; Jackson County Auditor Vicki Wilson; and Jackson County Commissioners Bruce Conlee, Robert Holcomb, Ron Gartner, Clarence Reutter, and Jack Evans, Appellees.

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FOR THE EIGHTH CIRCUIT

BRIEF OF JACKSON COUNTY, SOUTH DAKOTA IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

This lawsuit had its genesis in the State of South Dakota's former system of county government as established by state law. The state was divided into counties, some of which were organized and some unorganized for purposes of county administration and government. Organized counties had elected officials, such as county commissioners, judges, county clerks, register of deeds, auditor, treasurer and county attorney. Officials of organized counties administered the affairs of attached unorganized counties as well as their own.

Since the early 1900s, Washabaugh County was an unorganized county within the Pine Ridge Indian Reservation which was attached to organized Jackson County. According to the 1970 census, Washabaugh County consisted of approximately 685,000 acres and 1,389 people, of whom 772 were Indians. Jackson

County had a population of roughly 1,531 people with only 86 Indians. Both counties were therefore sparsely populated and located in a rural area.

Washabaugh and Jackson Counties had an ongoing relationship well before their 1979 consolidation. Jackson County provided all governmental services to Washabaugh County, except that the Washabaugh County Road Board supervised the construction and maintenance of all highways, roads and bridges within Washabaugh County.

Shortly after the decision in Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975), where the Eighth Circuit Court of Appeals ruled that residents of unorganized counties must be permitted to vote for county officials of the organized county to which they are attached, residents of Washabaugh County circulated petitions in July 1976 seeking a general election on the

issue of consolidating Washabaugh County with Jackson County. Both Indian and non-Indian residents signed these petitions. The consolidation issue appeared on the November 2, 1976, general election ballot. Because a majority vote had been obtained in both counties in favor of consolidation, the Governor of the State of South Dakota issued a proclamation creating the consolidation and making it effective as of January 1, 1979.

After consolidation occurred, the functions of county officials remained unchanged. The Washabaugh County Road Board, however, was terminated and its responsibilities were assumed by the Board of County Commissioners of Jackson County. Consolidation did not augment the authority of Jackson County over Indians living within the boundaries of what was formerly Washabaugh County. Jackson County officials, however, provide various services for both Indians and non-Indians.

Since the consolidation, Jackson County still provides only the most fundamental services: license plates, recording deeds and birth and death certificates; keeping of tax records; distribution of food stamps; veteran benefits and services; highway, road and bridge maintenance; public school system; police protection; and judicial services. It has not implemented a comprehensive system of regulations and ordinances.

B. PROCEEDINGS BELOW

On May 13, 1977, the Oglala Sioux Tribe instituted this lawsuit by filing an action for declaratory and injunctive relief against the State of South Dakota and the County of Jackson. The Tribe sought to obtain a permanent injunction preventing the proposed consolidation of Washabaugh County to Jackson County for purposes of government and administration under South Dakota law. With its complaint, the Tribe filed an application for

a temporary restraining order to enjoin consolidation of the two counties, which was denied on December 18, 1978. A hearing on the Tribe's motion for a preliminary injunction was held on December 20, 1978. On December 25, 1978, the court denied that motion, finding that the Plaintiff had failed to demonstrate that its powers as a tribe would be significantly affected by the consolidation of the counties. On January 1, 1979, the consolidation of the two counties was effectuated.

On December 20, 1978, the Tribe filed an amended complaint seeking the same basic relief as before. Thereafter, on September 11, 1981, the Tribe filed a second amended complaint. Jackson County and the State filed their answers on May 4, 1982, and May 10, 1982, respectively.

A trial on the merits was held on October 11-13, 1983. On December 27, 1983,

the district court entered a memorandum opinion. The court concluded that the consolidation of Washabaugh and Jackson Counties neither interferes with the Tribe's right of self-government nor is prohibited by federal law. The court found that the Tribe failed to provide any evidence that consolidation increased the scope of state governmental activity in the Washabaugh County area, and, therefore, it did not infringe on Plaintiff's rights to self-government. On December 10, 1983, the district court entered a final judgment for Jackson County and the State.

On January 5, 1984, the Tribe moved to amend and supplement the court's memorandum opinion with findings of fact and separate conclusions of law consistent with the requirements of Rule 52(a) of the Federal Rules of Civil Procedure. On June 29, 1984, the district court issued a supplemental memorandum opinion denying the Tribe's motion.

On July 27, 1984, the Tribe filed its appeal to the Eighth Circuit. In a decision filed August 15, 1985, the Eighth Circuit Court of Appeals affirmed the judgment of the district court, specifically finding that the mere existence of a general purpose state governmental body on the Pine Ridge Reservation is not preempted by federal law nor impermissibly infringed upon tribal self-government.

SUMMARY OF ARGUMENT

While Indian reservations as a general rule are places where Indian people may govern themselves free from state interference, state law may somtimes govern activities within a reservation, particularly of non-Indians. The consolidation of Jackson and Washabaugh Counties does not violate federal law or treaties or interfere with tribal self-government. The Tribe has not charged or proven that a specific state or

county ordinance has interfered with its right to self-government or some other right established by federal law, and the relief it requests is not directed at any such specific fact situation. The United States Court of Appeals for the Eighth Circuit correctly held that the consolidation of the two counties in and of itself did not violate the right of the Tribe to govern itself. Since the federal question of law decided does not conflict with applicable decisions of this Court on the subject, the petition of the Oglala Sioux Tribe for a writ of certiorari should be denied.

ARGUMENTS AND AUTHORITIES

THE UNITED STATES COURT OF APPEALS WAS CORRECT IN HOLDING THAT A STATE IS NOT PRECLUDED FROM INCLUDING AN ORGANIZED COUNTY WITHIN THE BOUNDARIES OF AN INDIAN RESERVATION.

A. GENERAL PRINCIPLES

In the early days of the United States, Indian reservations were, in a real sense,

separate from the states which surrounded them. Chief Justice Marshall stated in Worcester v. Georgia, 5 Pet. (31 U.S.) 515, 557 (1832), "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the Union."

Since those early days, however, the position of Indian tribes in the American scheme of government has changed considerably, and "notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians." McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164, 171 (1973).

Thus, generally state laws apply to the actions of non-Indians on a reservation if Indians are not affected. For example, a

non-Indian committing a crime against a non-Indian would be subject to state law. United States v. McBratney, 104 U.S. 621 (1882); Draper v. United States, 164 U.S. 240 (1896); United States v. Antelope, 430 U.S. 641, 644, n. 4 (1977); United States v. Dodge, 538 F.2d 770, 775 (8th Cir. 1976), cert. denied, 429 U.S. 1099 (1977). Likewise, a non-Indian would be subject to state tax for transactions arising on an Indian reservation if Indians are not significantly affected. Utah and Northern Ry. v. Fisher, 116 U.S. 28 (1885); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-483 (1976); Washington v. Confederated Tribes, 447 U.S. 134 (1980).

Secondly, some state authority applies directly to Indians on Indian reservations. For example, in 18 U.S.C. 1161, Congress required that all sales of alcoholic beverages on a reservation must be in compliance

with state law, including any state licensing requirements. See Rice v. Rehner, 436 U.S. 713, 103 S.Ct. 3291 (1983). In 25 U.S.C. 231, Congress authorized state agents to go on Indian reservations to inspect health and educational conditions and to enforce state "sanitary and quarantine regulations." In the McCarran Amendment, 43 U.S.C. 666, Congress authorized state courts to adjudicate Indian water rights through the joinder of the United States (as trustee for the Indians) in comprehensive state water rights adjudications. Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 103 S.Ct. 3201 (1983). Similarly, in Moe v. Confederated Salish and Kootenai Tribes, supra, and Washington v. Confederated Tribes, supra, the Court held that the state could require Indians to collect state taxes on reservation sales of cigarettes to non-Indians. Cf. Three Affiliated Tribes v. Wold Engineering,

__ U.S. __, 104 S.Ct. 2267 (1984)(state courts may adjudicate suits by Indians against non-Indians arising on a reservation).

In sum, Chief Justice Marshall's pure concept of Indians living wholly apart from states no longer exists; and to some degree, state law has an effect on Indian reservations. Moreover, in recent decisions, the Supreme Court has clarified the rule for determining whether or not state law applies. Except where Congress has expressly made state law applicable, tribal members themselves while within their reservations are generally not subject to state law. McClanahan v. Arizona State Tax Commission, supra; Bryan v. Itasca County, 426 U.S. 373 (1976). But a state's assertion of authority as against non-members on an Indian reservation is forbidden by federal law only (1) if it would undermine the "right of reservation

Indians to make their own laws and be ruled by them"; Williams v. Lee, 358 U.S. 217 (1959); or (2) if the state authority is preempted by federal law. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 142 (1980); Ramah Navajo School Board v. Bureau of Revenue, 458 U.S. 832, 836-838 (1982); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 331-336 (1983).

This test is not suited for broad generalizations. The Court described its application in Bracker, supra, 448 U.S. at 145:

> This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake, an inquiry designed to determine whether, in the specific context, the exercise of state authority would violate federal law.

B. THE PRESENT CASE

In the present case, the Tribe argues that federal law prohibits the consolidation

of Jackson and Washabaugh Counties, with the resulting inclusion of Pine Ridge Reservation territory within the boundaries of an organized county. Accordingly, the principles set out above apply: the state action is forbidden only if it either interferes with tribal self-government or if it is preempted by state law.

1. Self-government.

The consolidation does not, in and of itself, interfere with the right of the Oglala Sioux Tribe to govern itself. At this stage, the consolidation is only a change in the framework of state law, and has no visible effects on individual Indians on the reservation or the operation of tribal government itself.

There are a number of actions to be sure which the County might take which would conflict with tribal self-government or be inconsistent with federal law; but such a

possibility does not make all potential actions by the county illegal because they interfere with tribal self-government. The unspecified potential for such actions does not entitle the Tribe to the broad relief they seek.

In its petition for writ of certiorari, the Tribe attempts to raise as an issue county taxation methods. The issue was not addressed at trial. Even so, the Tribe's claim that their right to self-government is interfered with on this basis is incorrect. Only an individual taxpayer has the standing to challenge taxation by the county. Unless an individual taxpayer makes an objection, there is no basis to make an inquiry as to the race of the owner. Furthermore, even if the individual did raise the issue, there would still need to be a further determination on whether the individual Indian had

"severed his tribal relations." United States v. Rickert, 188 U.S. 432, 25 S.Ct. 478, 482 (1903).

Unless the Tribe can establish that the system of county taxation interferes with the Tribe's taxation scheme--and they cannot--the preemption analysis does not apply. As this Court stated recently.

> The mere existence of state authority to tax doesn't deprive the Indian tribe of its power to tax . . . There is no direct conflict between the state and tribal schemes since each government is free to impose its taxes without ousting the other.

Merrion v. Jicarilla Apache Tribe, 450 U.S. 130, 151 (1981).

2. Federal preemption.

The Tribe's petition spends most of its space on federal preemption. The Tribe does not set out specific factual situations where a particular county activity is preempted,

and the relief it seeks is broad--to eliminate the county. Instead, the Tribe concentrates its arguments on treaties and statutes which it claims prohibit state jurisdiction over its reservations.

a. The 1861 Dakota Territory Organic Act and the 1889 Enabling Act

The Tribe relies on two general federal statutes for the proposition that the State may have no jurisdiction at all on the reservation. The first of these, the Dakota Territory Organic Act, 12 Stat. 239, states that if a treaty requires that tribal lands not be included within the boundaries of a state or territory, then that land will be "excepted out of the boundaries and constitute no part of the Territory of Dakota . . . ." The second of these is the Enabling Act of February 22, 1889, 25 Stat. 676. Section 4 of that act disclaims "all right

and title . . . [to lands] owned or held by any Indian or Indian tribes," and states that those lands "shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 677.

The first of these two acts is no longer effective here since the Dakota territory no longer exists. In any event, it merely reflects "extraterritorial" status of a reservation if the treaty creating the reservation so requires, and therefore adds nothing to the legal status of a reservation.

The second of these two acts still has vitality, though it has limited application. The "disclaimer" provision in the Enabling Act is found in virtually the same form in the enabling acts of many of the western states. Arizona v. San Carlos Apache Tribe, supra, 103 S.Ct. at 3211, and n. 12. It is, moreover, the very same statute governing the admission of Washington and Montana where it

was found to erect no absolute shield against state jurisdiction. See Washington v. Yakima Indian Nation, 439 U.S. 463 (1979); Montana v. United States, 450 U.S. 544 (1981). The purpose of the Act was to assure that the states would not become directly involved in Indian affairs, at least without permission of the federal government. Plainly, this provision is wholly compatible with the two-prong test set out in recent decisions of the Supreme Court to determine whether a particular exercise of state jurisdiction is acceptable. Three Affiliated Tribes v. Wold Engineering, supra, 104 S.Ct. at 2271, 2274-2275; Arizona v. San Carlos Apache Tribe, supra, 103 S.Ct. at 3210-3212. Cf. Draper v. United States, supra, cited by the Court in San Carlos. It does not require that the reservation be "extraterritorial" to the state.

b. The 1868 Treaty of For Laramie and the Act of March 2, 1889

The Tribe places chief reliance on these two tribal agreements. The 1868 Fort Laramie Treaty, set out at 15 State. 635, established a large reservation (generally called the Great Sioux Reservation) "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." It also gave the promise of the United States that no other persons, except federal officers, would be permitted on the reservation "except as hereinafter provided." Article II of the Treaty, 15 Stat. 636.

Article XII of the Treaty, 15 Stat. 639, set out conditions for the modification of the reservation's boundaries:

> No treaty for the cession of any portion or part of the reservation herein described which may be held in common shall be of any validity or force as against the said Indians, unless executed and signed by at least three fourths of all the adult male Indians, occupying or interested in the same. . . .

The Act of March 2, 1889, 25 Stat. 888, substantially changed both the scope and the nature of the reservation created by the 1868 Treaty. Sections 1 through 7 of the act create smaller reservations for the various bands of the Sioux Tribe. The land outside of those reservations is restored to the public domain under Section 21.

Sections 8 through 11 permit the President to make allotments of land to individual Indians, pursuant to the General Allotment Act, with the permission of each band. Significantly, under Section 11, "the law of descent and partition in force in the State or Territory" is made applicable to the allotments. Article 12 permits the President

to negotiate for the purchase of portions of the new reservations not allotted, with the land to be sold to bona fide settlers. Section 30 of the Treaty requires the Secretary of the Interior to have schools built on the new reservations. The section further states that "any white children residing in the neighborhood are entitled to attend the said school on such terms as the Secretary of the Interior may prescribe."

Section 19 provided, inter alia, that the provisions of the Treaty of 1868 should remain in force "if not in conflict with the provisions and requirements of this act." Section 28 requires approval by the Indians as follows:

> That this act shall take effect, only, upon the acceptance thereof and consent thereto by the different bands of the Sioux Nation of Indians, in manner and form prescribed by the twelfth article of the (1868 treaty) . . ., which said acceptance and consent, shall be made known by proclamation by the

> President of the United States upon satisfactory proof presented to him . . ., which proof shall be presented to him within one year from the passage of this act; and upon failure of such proof and proclamation this act becomes of no effect and null and void.

It is undisputed that the President issued a proclamation, 26 Stat. 1554, finding appropriate approval of the act by three-fourths of the adult male Indians on the reservation.

The Tribe argues that the 1868 Treaty set aside the Great Sioux Reservation for the exclusive use of the Indians, and that therefore it was outside of the boundaries of any state and thus could not be included within an organized county. This claim is without merit. The 1868 Fort Laramie Treaty was abrogated by the enactment of subsequent federal statutes reducing the reservation to individuals, including the Act of March 2, 1889. The allotment of reservation lands and the later alienation of a large amount of

those lands implicitly abrogates the "exclusive use" provision of the treaty. Montana v. United States, 450 U.S. 544 (1981); Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165 (1977).

Apart from the specific language of the treaty and the case law, and merely as a matter of Indian "common law," the Pine Ridge Reservation should not be treated differently with regard to state jurisdiction than other Indian reservations. No one in this case has disputed the general principle that Indian tribes are entitled to self-government and that states generally lack the authority to govern the affairs of Indians on reservations. However, the fact remains that reservations are within the boundaries of states and the decisions of this Court have made it clear that in some circumstances the states have a legitimate interest in the activities on the reservation, particularly

among the non-Indian population. Similarly, the Indian citizens living on reservations have a real interest in the affairs of the state encompassing the reservation. In view of these broad holdings, it is inconsistent with the modern positions of Indian tribes in the federal scheme of the United States for a reservation to be wholly outside any state jurisdiction. See United States v. Wheeler, 435 U.S. 313, 323 (1978). If for no other reason this should defeat the Tribe's argument that the state has no right to include the reservation within the boundaries of a county.

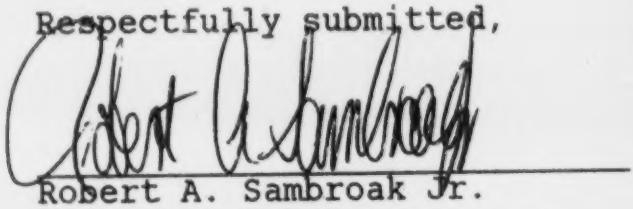
CONCLUSION

As set forth above there is little doubt that the Pine Ridge Reservation is subject to some limited state jurisdiction. Because of this jurisdiction, it is appropriate for the State of South Dakota to include the reservation within the framework of an organized

county. In view of the fact that the decision of the United States Court of Appeals for the Eighth Circuit so holding does not conflict with applicable decisions of this Court, the Tribe's petition for writ of certiorari should be denied.

Dated this 2nd day of January, 1986.

Respectfully submitted,



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Supreme Court, U.S.
FILED
JAN 2 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

THE STATE OF SOUTH DAKOTA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS THE STATE OF SOUTH DAKOTA AND THE HONORABLE WILLIAM J. JANKLOW, GOVERNOR

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QUESTION PRESENTED

Whether the consolidation of an unorganized county, existing within the Pine Ridge Indian Reservation, with an off-reservation county impermissibly interferes with reservation self-government or impairs a right granted or reserved by federal law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet.App. A1-A13) is reported at 770 F.2d 730. The opinion and supplemental opinion of the District Court (Pet.App. B1-B6; C1-C4) are unreported. The opinion of the District Court in the companion case of Oglala Sioux Tribe v. Ben Handcock, et al. is unreported and appears in Respondents' Appendix A (hereinafter referred to as Res.App. A).

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STATEMENT OF THE CASE

A. STATEMENT OF FACTS

This is an action where the Oglala Sioux Tribe of the Pine Ridge Indian Reservation of South Dakota (hereinafter referred to as the Oglala) has challenged the January 1, 1979, consolidation of two South Dakota county governments. Prior to consolidation, the

unorganized county of Washabaugh, which was located within part of the Pine Ridge Indian Reservation, was attached to the unorganized county of Jackson for governmental purposes. Since statehood, South Dakota had used a system of county government constituted of both organized and unorganized counties. This system of government was discussed by the court of appeals in its opinion in this case (Pet.App. A1-A13) and in its opinions in the cases of United States v. State of South Dakota, 636 F.2d 241 (8th Cir. 1980), cert. denied, 452 U.S. 939 (1981); and Little Thunder v. State of South Dakota, 518 F.2d 1253 (8th Cir. 1975). Under the system, unorganized counties were attached to adjoining organized counties for governmental purposes. In the organized county, officials such as the county commissioners, register of deeds, auditor, sheriff, coroner and state's

attorney were elected. These county officials administered county government and provided governmental services to both the organized county and the unorganized county, except where state law specifically provided otherwise.[1] One such area was the supervision of construction and maintenance of highways and bridges in the unorganized county. State law provided for a highway board to be elected by the residents of the unorganized county to carry out that function.

Washabaugh County had been attached to Jackson County under this governmental system

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[1] Under the attachment system Jackson County officials provided basic governmental services to the residents of Washabaugh County. For example, license plates were purchased at the Jackson County Courthouse; deeds together with birth and death certificates were recorded at the courthouse; taxes were administered by Jackson County officials; food stamps were dispensed at the courthouse; and residents of Washabaugh County received the services of the elected officials of Jackson County such as the state's attorney, auditor, sheriff, treasurer, coroner, etc.

since the turn of the century. These two rural ranching counties were located in south central South Dakota. The 1970 census figures established that the county of Jackson had a population of 1,531, of which 5.6% were Indian. The former county of Washabaugh had a population of 1,389, of which 55.6% were Indian. The total acreage of Washabaugh County was approximately 685,400 acres, of which 282,000 acres were deeded land.

In the 1970s, the unorganized system of county government was challenged. At the time only three unorganized counties existed: Todd, Washabaugh, and Shannon. Residents of these unorganized counties brought a class action lawsuit challenging the provisions of South Dakota law which prevented them from voting for county officials in the organized county to which their county was attached. The Eighth Circuit Court of Appeals ruled that this restriction was a denial of equal

protection and mandated that residents of unorganized counties be allowed to vote for county officials for the organized county to which their county was attached. Little Thunder v. State of South Dakota, supra, at 1258. Subsequently, the Eighth Circuit Court of Appeals expanded its ruling in Little Thunder and mandated that citizens from the unorganized counties also be allowed to run for county office in the organized county to which their county was attached. United States v. State of South Dakota, supra, at 245. These two decisions effectively merged the two counties into one governmental unit.

After these rulings, various proposals were presented to the South Dakota Legislature. Residents of Todd County and Shannon County, and the organized counties to which they were attached, urged the legislature to organize Todd and Shannon Counties. These

efforts culminated in the passage of HB 1197 by the 1979 Legislature, which organized Todd and Shannon Counties. The act was challenged by the Attorney General of the United States as being violative of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973(c). A consent decree approving the organization of Todd and Shannon Counties was subsequently entered into. See South Dakota v. United States, No. 80-1976 (D.D.C. Nov. 1981); United States v. South Dakota, supra, at 245, n.6.

Citizens of both Jackson and Washabaugh Counties were concerned that the legislative proposals being promoted by the other affected counties would not be in their best interests. There had been through the years an ongoing relationship between Jackson County and Washabaugh County. In addition to having the same governmental unit provide services to the two counties, the two counties were in the same school district; and

Kadoka, the county seat for Jackson County, was the trade center for both counties. Residents were also concerned that if Washabaugh County was forced to organize on its own, the tax base would not be sufficient to support an independent county government.

As a result, residents of Washabaugh County circulated petitions under provisions of South Dakota law to call for an election on the issue of consolidating Jackson and Washabaugh Counties. Signatures of Indian as well as non-Indian residents from the county were obtained on these petitions. Public meetings were held to discuss the proposed consolidation. The consolidation issue was placed on the general election ballot for November of 1976. Under South Dakota law the question had to obtain a majority vote in both affected counties. See South Dakota Codified Laws, Annot. § 7-2-1 to 7-2-3 (1981 Rev.). At the election the consolidation was

approved by a majority of voters in both counties. The governor then issued a proclamation declaring the result of the election. The consolidation became effective on January 1, 1979. See South Dakota Codified Laws, Annot. §§ 7-2-4, 5 (1981 Rev.).

The functions of county officials after the consolidation were unchanged. Each county official who testified at trial indicated that his or her governmental function was the same after the merger as it was before. The only significant change resulting from the merger was the dissolution of the Washabaugh County Road Board and the assumption of those responsibilities by the board of county commissioners. The merger did not increase county government's authority over Indians residing within the boundaries of former Washabaugh County. County officials acknowledged that they had jurisdiction only over the activities of

non-Indians who resided within the area of former Washabaugh County. The consolidation did nothing to extend this jurisdiction. County officials do, however, continue to provide services to both Indians and non-Indians in the consolidated county. These services consist of only the most fundamental local governmental services, such as recording of deeds and birth and death certificates, road maintenance, issuing licenses, distributing food stamps and veteran's benefits, providing police protection and providing judicial services. The county has not implemented a comprehensive scheme of regulations or ordinances.[2]

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[2] Jackson County has not at any time, either prior to the merger, or subsequent to it, adopted any zoning ordinances, health or sanitation ordinances, ordinances regulating dumping sites or regulations concerning airport use. It has not authorized the sale of alcohol in former Washabaugh County; has not allowed the sheriff's office to regularly patrol the area of former Washabaugh County,

On May 16, 1977, the Oglala filed its original action seeking declaratory and injunctive relief against the State of South Dakota and Jackson County. The district court denied the Oglala's request for a preliminary injunction and thereby allowed the merger to go into effect on January 1, 1979. Subsequently, the Oglala filed an amended complaint alleging inter alia that it had aboriginal title to all the lands in former Washabaugh County. The Tribe was threatened with a motion to dismiss for failure to join indispensable parties and

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but instead responds to calls; has not adopted a comprehensive soil conservation plan; has not attempted to regulate or control prairie dogs; and does not have a comprehensive flood control plan. The county has not endeavored to establish any of these ordinances or regulations even though state law permits it to do so. County officials who served both before and after the consolidation describe their duties as being limited to providing fundamental services such as those found in a county courthouse and to providing residents with a road system, a school system, and law and order.

subsequently commenced a separate action against landowners in former Washabaugh County. Oglala Sioux Tribe v. Ben Handcock, et al., Civ. No. 80-5061 (S.D.D.C. Sept. 1, 1983). The two cases were later consolidated. The district court granted the Defendants' motion for summary judgment in the Handcock case. (Resp.App. A) The Oglala did not appeal this dismissal.

After a bench trial, the district court found that the consolidation did not interfere with the Oglala's right to self-government and was not prohibited by federal law. (Pet.App. B-6.) The court of appeals affirmed, finding "that the mere existence of a general purpose state governmental body on the reservation is not preempted by federal law and does not impermissibly infringe on tribal self-government." (Pet.App. A-12.)

ARGUMENT AND AUTHORITIES

The decision of the court of appeals

does not conflict with any decision of this Court or any other court of appeals. The district court and the court of appeals fully considered the issues that were properly raised in this litigation. Review by this Court is therefore unwarranted.

The ultimate issue in this case is whether the consolidation of Jackson County and Washabaugh County is preempted by federal law or impermissibly infringes on tribal self-government. Rice v. Rehner, 463 U.S. 713 (1983). During seven years of litigation the Oglala have attempted to use this case to raise every possible complaint that they have had against the State of South Dakota and county government. The Oglala's petition reflects this approach by presenting issues that were not litigated at the district court level. Even though the Oglala raised numerous issues in an attempt to convince both the district court and the court of appeals that

the consolidation should not be allowed, both courts properly applied the standards set forth in previous opinions of this Court and determined that the fundamental issue was whether the principles set forth in Rice v. Rehner were violated by the existence of a general purpose state government within the Pine Ridge Indian Reservation.

The Oglala's case, although cloaked as an attempt to challenge the consolidation of these two counties, is a challenge to the mere existence of any form of general purpose state government on the reservation. The record at trial clearly established that the consolidation process was a mere change in form and not substance. Prior to the consolidation, Jackson County officials provided all basic governmental services to residents of Washabaugh County with the exception of those provided by the Washabaugh County Road Board. Every county official who

testified at trial stated that his or he function after the merger was the same as i was before. Even prior to the merger, resi dents of Washabaugh County were entitled t vote for, and run for, county offices i Jackson County. Little Thunder v. State o South Dakota, supra; United States v. Stat of South Dakota, supra. In reality the tw counties were operating as one governmenta unit. The Oglala's challenge therefore is a attempt to completely oust county governmen from the reservation. The court of appeal stated:

> The Tribe challenges the existence of a general purpose state governmental body on the reservation, rather than the exercise of specific state governmental jurisdiction on the reservation relating to a particular area such as taxation. [Footnote omitted.] Thus, the tribal sovereignty interest which the Tribe seeks to protect here involves the broad right to be the exclusive governmental body on the reservation.

(Pet.App. A-8.)

In Rice v. Rehner, supra, at 718, this Court established the test to be applied in determining whether state laws could be applied to reservation lands:

> '[E]ven on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.' Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973).

The views of Justice Marshall as expressed in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), on the status of Indian reservations as being distinct communities where state laws have no effect have been substantially, if not totally, departed from. Congress has "opened the doors of reservations to state laws, in marked contrast to what prevailed in the time of Chief Justice Marshall." Organized Village of Kake v. Egan, 369 U.S. 60, 74 (1962). States and counties have been found to have jurisdiction over certain lands

and certain types of conduct on Indian reservations. Rice v. Rehner, supra.

Previous decisions of this Court have recognized that except in a few limited areas of tribal interest, the sovereign powers of Indian tribes do not extend to the activities of nonmembers of the Tribe. Montana v. United States, 450 U.S. 544, 565 (1981). This Court has stated:

> [N]otions of Indian sovereignty have been adjusted to take account of the State's legitimate interest in regulating the affairs of non-Indians.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171 (1973). This Court has held that crimes committed by non-Indians against non-Indians within reservations are subject to state prosecution. United States v. Antelope, 430 U.S. 641, 644, n. 4 (1977); Draper v. United States, 164 U.S. 240 (1896); United States v. McBratney, 104 U.S. 621 (1882). This Court has also held that tribes

have no power to try or punish non-Indians. Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), cf. National Farmers Union Insurance Co. v. Crow Tribe, 471 U.S. ____, 85 L.Ed.2d 818 (1985). This Court has also held that states, and not tribes, have the authority to regulate non-Indian hunters who hunt on fee land within an Indian reservation. Montana v. United States, supra, at 566. This Court's rulings have also established that non-Indians and their property on reservations are normally suject to state and local taxation. Washington v. Confederated Tribes of the Colville Reservation, 477 U.S. 134, 151 (1980); Moe v. Confederated Salish and Kootenai Tribes, 425 U.S. 463, 481-483 (1976); Surplus Trading Co. v. Cook, 281 U.S. 647, 651 (1930); Utah and Northern Ry. v. Fisher, 116 U.S. 28 (1885).

Under certain circumstances this Court has recognized that state and local laws may

be applied to activities of Indians on reservations. Rice v. Rehner, supra; New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983); Puyallup Tribe v. Washington Game Dept., 433 U.S. 165, 174 (1977); Washington v. Confederated Tribes, supra, at 159-61; Organized Village of Kake v. Egan, supra, at 75; Arizona v. San Carlos Apache Tribe, 463 U.S. 545 (1983).

In order for the State to implement these powers, local governmental units within reservation boundaries are needed. County government in one form or another has existed within Indian reservations in South Dakota since territorial days.

Today organized county governments exist unchallenged on every other reservation in South Dakota. The previously cited cases indicate the vast interest state government has over on-reservation activities of non-Indians who reside on reservations. Corres-

pondingly, there are many areas where tribal governments have no authority, i.e., criminal prosecutions. State and local government is needed to fill this gap. At the time the consolidation petition and election process was taking place in Jackson and Washabaugh Counties, almost half of the residents from Washabaugh County were non-Indian and almost 41% of the lands in Washabaugh County were deeded lands. County government is necessary to provide governmental services to those people and those lands.

The Tribe attempts to distinguish this reservation from others in an effort to convince this Court that it should order the ouster of state government from the Pine Ridge Indian Reservation. The distinctions cited by the Oglala are not significant and do not mandate a different approach by this Court.

The Oglala maintain that because of previous treaties and acts of Congress the land area that was Washabaugh County remains unceded Indian territory. Both the district court and the court of appeals found that the issue of ownership of these lands was irrelevant. (Pet.App. A-10, B-4.) The Oglala's claim also ignores almost two hundred years of history, acts of Congress and previous court decisions.[3]

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[3] Before the district court and court of appeals the Oglala asserted that the 1889 Act was invalid. Apparently the Oglala has abandoned that argument and therefore has acknowledged that the allotment of land in former Washabaugh County resulting after the 1889 Act and the influx of non-Indian landowners into the area was done in a legal manner. In fact in Sioux Tribe v. United States, 97 Ct.Cls. 391, 396 (1942), the Oglala agreed the the 1889 Act was valid. The allotment of reservation lands and the later alienation of a large amount of those lands implicitly abrogates the "exclusive use" provision of treaties. Montana v. United States, supra, at 558-61; Puyallup Tribe, Inc. v. Dep't. of Game of Washington, supra.

Furthermore, the Oglala's assertion that it owns all the land in former Washabaugh County was determined by the district court in the companion case of Oglala Sioux Tribe v. Ben Handcock, et al., (Resp.App. A). The Tribe failed to appeal that determination.

The Oglala also claim the State of South Dakota through the 1861 Territorial Organic Act and the South Dakota Enabling Act waived its right to establish county government on the reservation. The Dakota Territorial Act is of no significance to these proceedings because Dakota Territory no longer exists. The South Dakota Enabling Act is also of little significance.[4] This Court has stated:

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[4] In fact the same statute controlled the admission to the union of the states of Washington and Montana. This Court has already found that in those states the enabling act was not an absolute prohibition against state jurisdiction. Washington v. Yakima Indian Nation, 439 U.S. 463 (1979);

> [T]he presence or absence of specific jurisdictional disclaimers has rarely been dispositive in our consideration of state jurisdiction over Indian affairs or activities on Indian lands.

Arizona v. San Carlos Apache Tribe of Arizona, supra.

The court of appeals stated:

> The reason for the insignificant nature of such disclaimers in preemption cases is that "disclaimer[s] of right and title by the State[s] . . . [are] disclaimer[s] of proprietary rather than governmental interest" and the "absolute" jurisdiction and control over reservations typically given to United States by such disclaimers means "undiminished, not exclusive" control.

Montana v. United States, supra. The purpose of the enabling acts was to insure that states would not become directly involved in Indian affairs. This purpose is satisfied by application of the test set forth in Rice v. Rehner.

(Pet.App. A-10)(citing Kake v. Egan, supra, at 69, 71). The other acts cited by the Oglala in an attempt to distinguish the facts of this case from previous decisions of this Court are not persuasive.[5]

The second question the Oglala assert as a basis for granting a writ of certiorari, taxation of Indian lands, was not raised at

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[5] The Oglala's argument concerning Public Law 280 is misleading because the consolidation did not increase county jurisdiction over Indians. In fact officials indicated that they had no jurisdiction over Indian citizens living in former Washabaugh County, although Indian citizens are entitled to any services provided by county government. Similarly, the Oglala's assertion that tribal members are not citizens of the state of South Dakota is in no way relevant to this case. In any event, state citizenship is a right of each individual tribal member which the Tribe cannot sua sponte extinguish. It is clear that Indian are citizens of the United States under the fourteenth amendment are citizens of the state in which they reside. Goodluck v. Apache County, 417 F.Supp. 13, (D.Ariz. 1975), aff'd 429 U.S. 876 (1976). The conferral of citizenship is mandatory and not conditional upon individual acceptance. Ex parte Green, 123 F.2d 862 (2nd Cir. 1941), cert. denied, 316 U.S. 668 (1942).

the district court level and does not justify the issuance of a writ by this Court. The Oglala misinform the Court by implying that the issue of taxation of Indian lands was litigated before the district court. After the pre-trial conference in this case, the district court entered an order setting forth the issues asserted by the parties. (Resp. App. B.) The issue of taxation of Indian lands was not listed by the Oglala. The fact that neither the district court nor the court of appeals discussed this allegation further establishes that the issue was never properly before either court. In fact the court of appeals stated that the:

> [T]ribe challenges the existence of a general purpose state governmental body on the reservation, rather than the exercise of specific state governmental jurisdiction on the reservation relating to a particular area such as taxation.

(Pet.App. A-8)(final emphasis added.)

The Oglala mislead this Court by asserting that county government knowingly taxed deeded land owned by Indians and conspired to raise taxes of Indians while reducing taxes of non-Indians. These allegations ignore the taxation process and the record established at the district court. The Oglala would attempt to have this Court believe that only Indians reside in former Washabaugh County when in fact almost half of the population at the time of the consolidation process was non-Indian. The record does not establish that any Indian lands were taxed by the county. The record establishes that the county taxed all deeded lands and no determination was made on the racial background of the owner of the property. (Resp.App. C) (Transcript 418.) Such a determination would not be possible absent a claim by the individual landowner that he was Indian and exempt from taxation. Nothing in the record

establishes that any individual Indian landowner of deeded land has challenged taxation of his property. With the option of placing property in trust available to Indian landowners, few if any would choose to remove their land from trust.

The Oglala's assertion that after the consolidation Jackson County raised taxes of Indians and reduced taxes of non-Indians is also misleading. After the consolidation, taxes in the new county were equalized. Because the mill levy in Washabaugh County had been lower prior to the merger, a tax increase did result. This increase applied to all landowners of deeded land, non-Indian and Indian (if any Indians did own deeded land). The decrease in taxes for former Washabaugh County correspondingly applied to all residents, Indian and non-Indian.

Even if the Oglala had properly raised this issue and the record did establish that

deeded lands owned by Indians were being taxed, the Oglala would not be entitled to relief. Only the individual taxpayer, not the tribe, has standing to challenge such taxation. Deeded land in Jackson County was taxed without determining the race of the owner of the property. Unless an individual taxpayer makes an objection, there is no basis for making inquiry as to the race of the owner. Even if an objection was raised, there would be a need to make a determination as to whether the Indian had "severed his tribal relation." United States v. Rickert, 188 U.S. 432 (1903). Furthermore, unless the Oglala can establish that the system of county taxation directly interferes with their taxation scheme, the preemption analysis does not apply. This Court has stated:

> [T]he mere existence of state authority to tax does not deprive the Indian tribe of its power to tax . . . . There is no direct conflict between the state and

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Supreme Court, U.S.
FILED
JAN 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

THE OGLALA SIOUX TRIBE OF THE
PINE RIDGE INDIAN RESERVATION,

Petitioner,

v.

THE STATE OF SOUTH DAKOTA, ET AL.,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENTS THE STATE OF SOUTH DAKOTA AND THE HONORABLE WILLIAM J. JANKLOW, GOVERNOR

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QUESTION PRESENTED

Whether the consolidation of an unorganized county, existing within the Pine Ridge Indian Reservation, with an off-reservation county impermissibly interferes with reservation self-government or impairs a right granted or reserved by federal law.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (Pet.App. A1-A13) is reported at 770 F.2d 730. The opinion and supplemental opinion of the District Court (Pet.App. B1-B6; C1-C4) are unreported. The opinion of the District Court in the companion case of Oglala Sioux Tribe v. Ben Handcock, et al. is unreported and appears in Respondents' Appendix A (hereinafter referred to as Res.App. A).

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